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In the
Supreme Court of The United States

OCTOBER TERM, 1974

NO.

CLEVELAND BROWNS, INC.
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Temporary Emergency Court of Appeals
of the United States

Petitioner, Cleveland Browns, Inc., prays that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals of the United States entered in the above case on September 13, 1974.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio (Eastern Division) is not yet reported and appears as Appendices A and A-1. No opinion was delivered by the Temporary Emergency Court of Appeals and its judgment affirming the order of the District Court appears as Appendix B.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on September 13, 1974. The jurisdiction of this Court is invoked under § 211(g) of the Economic Stabilization Act Amendments of 1971, P.L. 92-210; 85 Stat. 743.

QUESTIONS PRESENTED

Preface

On August 10, 1973, the Respondent filed suit against the Petitioner in the District Court seeking a determination that Petitioner had violated the Phase I price controls issued by the President on August 15, 1971 (Executive Order No. 11615) pursuant to the Economic Stabilization Act of 1970. The Respondent further contended that since the Petitioner's sale of football tickets between August 15, 1971 and November 13, 1971 were made at prices higher than permitted by the Phase I controls, the Petitioner had to refund such "excess" charges. Prior to the commencement of this case, litigation had been commenced in the District Courts of Georgia and California by professional football clubs against the Government on the same issues involved herein. The Five Smiths, Inc., owners and operators of the Atlanta Falcons professional football club, filed an action in the United States District Court for the Northern District of Georgia, against William H. Holloway, et al. seeking a determination of the validity of the Executive Order and Economic Stabilization Act of 1970 to its sales of football tickets prior to and during Phase I. Two related cases, *Burt DeRieux, et al. v. Five Smiths* and *United States of America v. The Five Smiths, Inc.* were consolidated with *The Five Smiths* case and all questions raised in the three cases were certified to the Temporary Emergency Court of Appeals (T.E.C.A. Nos. 5-6, 5-7, and 5-8). These consolidated cases hereinafter will be referred to as *DeRieux*.[1] In addition, the Oakland Raiders, in November, 1971, filed an action in the District Court for the Northern District of California, wherein it also challenged the validity of the President's Executive Order of August 15, 1971, and the Economic Stabilization Act of 1970. On

[1]Appendix C

June 20, 1974, an opinion was delivered by the T.E.C.A. in *DeRieux* upholding the Government's contention. On July 10, 1974, the T.E.C.A., without opinion, affirmed the judgment of the District Court in the *Oakland Raiders* case, (T.E.C.A. 9-11) on the authority of *DeRieux*, and on September 13, 1974, the T.E.C.A. affirmed the judgment of the District Court in the instant case on the authority of *DeRieux* and *Oakland Raiders*[2] as well as on the authority of the *University of Southern California v. C.C.L.C.*, 472 F. 2d 1065 (1972), cert. denied, 410 U.S. 928 (1973).

The questions presented by this Petition are:

(1) Whether the Court properly declined to hold unlawful and set aside Executive Order 11615 as required by Section 706(2)(D) of the Administrative Procedure Act notwithstanding a finding by the TECA in *DeRieux* that the President is subject to Section 553 of the Administrative Procedure Act and a further finding that the procedures set forth in that section were not observed.

(2) Whether the Temporary Emergency Court of Appeals abdicated its responsibility as an Article III Court by failing to make an independent judicial interpretation of the Executive Order, rather than merely rubberstamp the OEP's position under the "great deference" rule?

(3) Whether the construction of Executive Order 11615 to require refunds of price increases for regular season games played between August 15, 1971 and November 13, 1971, notwithstanding that the tickets were sold prior to August 15, 1971 constituted an *ex post facto* law and the taking of property without just compensation.

(4) Whether the District Court exceeded its power when it incorporated into its Order the "fluid recovery theory" directing Respondent to reduce the prices of

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[2]Appendices D and E

future ticket sales until the amounts received from unidentifiable ticket purchasers during Phase I is exhausted.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND EXECUTIVE ORDER INVOLVED

1. The Administrative Procedure Act, 5 U.S.C., §§ 551, 553, 706 (1970).[3]

2. Executive Order No. 11615, 36 Fed. Reg. 15727 (August 15, 1971).[4]

3. "No Bill of Attainer or ex post facto law shall be passed". Constitution, Article I, § 9, cl. 3.

4. "No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation". Constitution, Amendment V.

STATEMENT OF THE CASE

This case arises out of Presidential Executive Order No. 11615, issued on August 15, 1971, pursuant to the Economic Stabilization Act of 1970, which imposed a ninety day period of wage and price controls known as Phase I. It is the contention of the Petitioner that such Executive Order was issued in clear violation of the mandatory provisions of the Administrative Procedure Act and is invalid. Also involved is the standard of judicial review of informal guides or administrative interpretations of the Executive Order by the Office of Emergency Preparedness which were accepted and ordered enforced by the lower courts out of "great deference" without affording petitioner the kind of independent judicial review which Article III and due process of law require. Petitioner fur-

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[3]Appendix F
[4]Appendix G

ther asserts that the construction of the Executive Order adopted by the Temporary Emergency Court of Appeals, as applied to petitioner, is an *ex post facto* law and deprives the petitioner of vested property rights without due process of law. Should this Court decide these questions adversely to petitioner, the petitioner further contends that the judgment herein, insofar as it incorporates the "fluid recovery theory" of damages, is invalid.

Petitioner (hereinafter referred to as "Cleveland Browns") is the owner of the National Football League team known as the Cleveland Browns. In the fall of 1970 the Cleveland Browns made the decision to increase the price of all tickets to their home games to be played during the 1971 season. These prices were publicly announced on January 7, 1971, and order forms reflecting the increased prices were mailed to season ticket holders on January 26, 1971. During the period from February 1st to July 29, 1971, the bulk of the 1970 season ticket holders had renewed their tickets for the 1971 season. As of July 29, 1971, the Browns accepted orders for 47,604 season tickets for each of the 1971 seven (7) regular season home games, together with orders for 38,420 tickets for its preseason home game of September 4, 1971. All of these tickets were fully paid for as of July 29, 1971. Between August 2nd and August 6, 1971, the Browns mailed 47,604 season tickets (which represented 333,228 tickets) for its seven regular season home games in 1971, and 38,420 tickets for the September 4, 1971 preseason home game. As of August 12, 1971, the Browns had sold and delivered to the purchasers thereof, 48,033 season tickets for each of its seven home games; 66,512 tickets for the September 4, 1971 preseason game, and an additional 19,835 tickets for various of its home games in 1971. All of these tickets were fully paid for as of August 12, 1971, and the sum received therefor represented 74.7% of the proceeds received from all home game sales in 1971.

Prior to August 15, 1971, the Browns made several financial commitments in reliance upon the additional revenues to be produced by the 1971 price increases, including contracting to pay veteran players $105,335.00 more in salaries for 1971 over 1970.

On August 15, 1971, the President issued Executive Order No. 11615, imposing economic controls for a 90-day period commencing August 15, 1971 and ending on November 13, 1971. The Executive Order provided in pertinent part:

> Section 1. (a) Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.

It was stipulated by the respondents that the President did not, prior to the issuance of the Executive Order, give notice of an intention to issue such order, that the President did not give interested persons an opportunity to submit written data, views or arguments, and that, alternatively, the President did not make any finding that notice and public procedure thereon impracticable, unnecessary or contrary to the public interest, or incorporate

such a finding and the reasons therefor in the record as a part of the Executive Order.

During Phase I, the OEP sporadically issued what were known as "Circulars" containing various OEP interpretations of the Executive Order. These Circulars expressly stated that they were issued "for general information only . . . [as] general guides compiled from OEP Economic Stabilization Circulars and do not constitute legal rulings." OEP Cir. No. 101, 36 Fed. Reg. 18739 (Sep. 21, 1971).

These Circulars provide a tentative and often shifting interpretation of the Executive Order. A good example is control of school tuitions. Complete exemption was provided in OEP Reg. No. 1, 36 Fed. Reg. 16515 (Aug. 21, 1971), but revoked three days later by an amendment. 36 Fed. Reg. 16585 (Aug. 24, 1971). Then during the following month the OEP provided that tuition could be increased if there were substantial transactions during the base period, confirmed by deposits. OEP Cir. No. 101, § 403(9), 36 Fed. Reg. 18739 (Sept. 21, 1971). One month later, the OEP provided that *any* deposit during the base period was sufficient to make the tuition a complete transaction. OEP Cir. No. 102, § 403(5), 36 Fed. Reg. 20482 (Oct. 20, 1971).

On September 11, 1971, the OEP issued Circular No. 11 which contained the OEP's only statement with reference to the application of the Executive Order to sales of tickets to sporting events played during Phase I. Circular No. 11 provided in pertinent part:

> "The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze."

This administrative interpretation of the Executive Order was held by the lower court to be binding on the federal courts under the so-called "great deference rule" as applied by the Temporary Emergency Court of Appeals in a series

of Economic Stabilization Act cases beginning with the decision in *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (Temp. Emer. Ct. App. 1972), *cert. denied*, 410 U.S. 928 (1973).

The Cleveland Browns played six home games (five regular season and one preseason) during Phase I. The team had sold, delivered and paid for 322,445 tickets to these games at increased prices prior to the issuance of the Executive Order on August 15, 1971. The Browns sold an additional 132,348 tickets to these six games at increased prices during Phase I.

On August 10, 1973, the Respondent commenced this action in the United States District Court for the Northern District of Ohio (Eastern Division), and on July 1, 1974, the District Court granted the Respondent's Motion for Summary Judgment ordering petitioner to make restitution of the increase in the prices received (both prior and subsequent to August 15, 1971) for all six home games played during Phase I.

On Appeal, the Temporary Emergency Court of Appeals, without opinion, affirmed the judgment of the District Court primarily on the authority of *DeRieux v. The Five Smiths, Inc.* (Appendix C).

In *DeRieux* the court considered the Administrative Procedure Act (APA) argument advanced by The Five Smiths, which argument was also advanced by the Cleveland Browns, and held that, assuming the President is an "agency" within Section 1, 5 U.S.C. § 551, of the APA, and further assuming he was engaged in rule-making within Section 4, 5 U.S.C. § 553 of the APA when he issued Executive Order 11615, the order would not be set aside even though the Government had stpilated that no notice of rule-making was given nor finding made and/or incorporated in the order that notice was "impracticable, unnecessary, or contrary to public interest". The court further held that the Executive Order, as construed, did not violate the

constitutional prohibition against *ex post facto* laws as it did not *punish* The Five Smiths for prior conduct nor did it constitute the taking of property without just compensation as The Five Smiths did not have a vested and unqualified right to the proceeds of tickets sold prior to August 15, 1971.

The effects of these rulings were to convert Phase I from a "freeze" to a "roll back" of the Browns' ticket prices, contrary to the stated intentions of the President, and to impose a retroactive *price* freeze upon completed sales of football tickets to the Browns' games without a corresponding *wage* freeze upon the salaries of the Browns' players who were to perform in the same games.

Because these rulings of the Temporary Emergency Court of Appeals present issues of great public importance which are in direct conflict with controlling provisions of the Administrative Procedure Act, precedent in other Courts of Appeal, and decisions of this Court defining the relationship between Article III courts and administrative agencies, the petitioner seeks review of these rulings by this petition for writ of certiorari.

REASONS FOR GRANTING WRIT

I

BY REFUSING TO HOLD EXECUTIVE ORDER 11615 INVALID AS REQUIRED BY SECTION 706(2)(D) OF THE ADMINISTRATIVE PROCEDURE ACT, NOTWITHSTANDING AN ASSUMPTION THAT THE PRESIDENT IS AN "AGENCY" WITHIN SECTION 551 OF THE APA AND WAS ENGAGED IN "RULE-MAKING" WITHIN SECTION 553 OF THE APA, THE TEMPORARY EMERGENCY COURT OF APPEALS HAS FURTHER PERPETUATED A CONFLICT AMONG SEVERAL COURTS OF APPEAL AS TO THE EFFECT OF NON-COMPLIANCE WITH THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT AS SET FORTH IN SECTION 553 OF THE ACT.

The APA, 5 U.S.C. §§ 551, 553, generally requires that an agency, prior to engaging in rule-making, publish general notice of such proposed rule-making in the Federal Register and thereafter afford interested persons an opportunity to participate in rule-making through submission of written data, views or arguments.

5 U.S.C. § 706(2)(D) states that a reviewing court shall:

> "Hold unlawful and set aside agency action, findings and conclusions found to be –
>
> . . .
>
> (D) without observance of procedure required by law."
>
> . . .

The only relevant exception to Section 553 states that the procedural requirements do not apply:

> "(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest."

The TECA in *DeRieux* (App. C, page 30) assumed the President is an "agency" within the mean of the Administrative Procedure Act. Such an assumption is a proper one, and is buttressed by the opinion of Judge Leventhal in *Amalgamated Meat Cutters and Butcher Work. v. Connally,* 337 F.Supp. 737 (1971) (D.D.C.), page 761, wherein he noted:

> "The leading students of the APA, whose analyses are often cited by the Supreme Court, and who on some matters are in conflict with each other, seem to be in agreement that the term 'agency' in the APA includes the President – a conclusion fortified by the care taken to make express exclusion of 'Congress' and 'the courts'."

The President is clearly subject to the requirements of the Administrative Procedures Act and Executive Order 11615 is, without doubt, a "rule" within the meaning of Section 551(4), a fact which was assumed by the Temporary Emergency Court of Appeals.

Given the foregoing premise and the Government's stipulation that no finding was made and/or incorporated in the Order by the President that notice and public procedure thereon was impracticable, unnecessary, or contrary to public interest, the provisions of the APA have clearly been violated.

The TECA, after the fact, then made a finding that good cause had existed for the issuance of the Order without findings and/or statement of impracticability and declined to void the Order stating:

> "We cannot agree that Congress intended to visit such consequence upon a technical violation of Section 553(b) where the reasons for exempting the President's action from the notice requirement are so obvious and compelling." (App. C, page 32.)

The Court then cited opinions of the Third and Fourth Circuits in the cases of *Appalachian Power Co. v. Environmental Protection Agency,* 4 Cir., 477 F.2d 495 (1973) and *Duquesne Light Co. v. Environmental Protection Agency,* 3 Cir., 41 F.2d 1 (1973) refusing to declare invalid state Clean Air plans which had been approved by the Administrator of the Environmental Protection Agency without notice as required by Section 553 of the APA.

The basis for such rulings, however, was a finding that Congress intended to create an exception to the requirements of Section 553 for the Clean Air Act when it required public notice and hearing at the state level prior to adoption of state plans which were thereafter submitted to the Administrator of the EPA.

As stated in the *Appalachian Power* case, *supra,* p. 503:

> "This conclusion, however, is based on the assumption that at the state hearing interested parties were offered full opportunity to present their contentions with respect to the proposed plan . . ."

In determining the same question, that is the validity of approval by the Administrator of the EPA of state Clean Air plans without notice and public procedure, the Court of Appeals of the Sixth Circuit in *Buckeye Power, Inc. v. Environmental Protection Agency,* 481 F.2d 162 (1973) held the approval invalid.

Furthermore, in an earlier Third Circuit case, *Texaco v. Federal Power Commission,* 412 F.2d 740 (1969) the court held that a regulation issued without compliance with the Administrative Procedure Act was invalid. Similar results have obtained in lower Federal Court. See *Kelly v. United States Department of Interior,* 339 F. Supp. 1095 (E.D.Cal. 1972); *Staley Mfg. Co. v. United States,* 310 F. Supp. 485 (D. Minn. 1970); *Pharmaceutical Manufacturers Assoc. v. Finch,* 307 F. Supp. 858 (D.Del. 1970); *National Motor Freight Traffic Association v. United States,* 268 F. Supp. 90 (D.D.C. 1967), aff'd 393 U.S. 18 (1968).

In addition to perpetuating the conflict among several Circuits regarding the effect of a violation of the Administrative Procedure Act, the failure of the Temporary Emergency Court of Appeals to invalidate the Executive Order effectively denies enforcement of the APA as mandated by Congress. As the District Court noted in *Kelly* wherein an administrative regulation was held invalid for failure to comply with the exception provisions of Section 553(b)(B):

> ". . . Upholding regulations which we think were defectively issued, furthermore, emasculates the Administrative Procedure Act. As the Court of Appeals for the Ninth Circuit has said, 'If notice of a proposed rule is not published in the Federal Register at least thirty days prior to its issuance, or if good cause is not found *and published* for the immediate issuance of a

rule, the rule cannot be legally issued.' (Emphasis ours.) Hotch v. United States, supra, 212 F.2d 284. We therefore find the amended regulations to have been illegally issued." 339 F. Supp. 1101-1102.

It is respectfully submitted that in order to resolve the conflict among the several Circuits and further to enforce the Congressional mandate contained in the Administrative Procedure Act that a writ should issue in the instant case.

II

THE TEMPORARY COURT ABDICATED ITS RESPONSIBILITY AS AN ARTICLE III COURT TO AFFORD INDEPENDENT JUDICIAL REVIEW OF ADMINISTRATIVE INTERPRETATIONS OF LAW AND IGNORED DECISIONS OF THIS COURT DEFINING THAT RESPONSIBILITY BY "RUBBER STAMPING" UNDER THE RUBRIC OF THE "GREAT DEFERENCE" RULE INFORMAL GUIDELINES AND INTERPRETATIONS ISSUED BY THE OEP WITHOUT ANY STATED REASONS OR EVIDENCE OF DEVELOPED EXPERTISE BY THE OEP IN MAKING SUCH INTERPRETATIONS.

The decision below is only one of a series of cases in which the Temporary Emergency Court of Appeals has ruled that the federal courts are obligated to give "great deference" to even the most informal guidelines and interpretations issued by the OEP and has granted such interpretations judicial enforcement without making an independent reasoned judicial evaluation of the correctness of the administrator's position. The Temporary Court's expansive interpretation of the "great deference" test was first enunciated by that Court in *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (Temp. Emer. Ct. App. 1972), *cert. denied*, 410 U.S. 928 (1973), and has been subsequently applied by that Court in a series of wage-price control cases. As the court below acknowledged, the "great deference" rule has been funda-

mental to the development of the law of this Court," that broad "reliance has come to be placed upon . . . the opinion, analysis and application of the 'great deference test' in the context of economic controls administration."

The lower court's interpretation of the so-called "great deference" rule constitutes an unprecedented expansion of the decisions of this Court in *Power Reactor Development Co. v. International Union of Electrical Radio & Machine Workers*, 367 U.S. 396, 408 (1961), and *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). Such expansion flies in the face of this Court's explanation in *Zuber v. Allen*, 396 U.S. 168, 192-94 (1969), that the rule giving "great weight" to contemporaneous administrative construction "is only one input in the interpretational equation" and that "[t]he Court may not . . . abdicate its ultimate responsibility to construe the language employed by Congress." The Browns' submit that precisely such an abdication of the judicial function to review rather than rubberstamp administrative decisions has occurred in this case. The ruling below constitutes a fundamental alteration in the relationship between the federal courts and administrative agencies heretofore defined by this Court in a long series of cases. Unless the proper standard of review is re-established by this Court, the ill-conceived and constitutionally-infirm "great deference" theory adopted by the TECA will be applied by the lower federal courts.

Article III of the Constitution demands that when the judicial process is invoked to enforce executive or administrative determinations, it is the duty and responsibility of the federal courts to make an independent, reasoned, judicial determination whether enforcement is warranted, and to deny enforcement when the courts determine that it is not. The opinion of Mr. Justice Brandeis in the *St. Joseph Stockyards Co. v. United States* is a classic statement of the role of the federal courts in the administrative process:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied [by an administrative agency] . . . .

298 U.S. 38, 84 (1936).

The constitutional right of judicial review is no less applicable in the area of price controls than in any other area of administrative action. Thus, in decisions upholding the constitutionality of the Emergency Price Control Act of 1942, *Yakus v. United States*, 321 U.S. 414 (1944), and *Bowles v. Willingham*, 321 U.S. 503 (1944), this Court went to great lengths to explain that, although the Congress had altered the procedure for obtaining judicial review, these alterations were not a denial of due process so long as *"the opportunity given for the ultimate judicial determination of the liability is adequate."* [Emphasis added.] 321 U.S. at 520. *See also Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944); *Fast v. DiSalle*, 193 F.2d 181, 184 (Emer. Ct. App. 1951).[5]

In *Davies Warehouse Co. v. Bowles, supra*, this Court independently reviewed and set aside an administrative interpretation by the OPA of the Emergency Price Control Act of 1942 and rejected the contention that the Court should defer to the OPA's contemporaneous administra-

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[5] *Cf.* Amalgamated Meat Cutters v. Connally, 337 F.Supp. 737 747 (D.D.C. 1971), in which the three-judge court placed particular reliance upon the availability of judicial review as salvaging the constitutionality of the Economic Stabilization Act by confining to constitutionally permissible bounds the broad authority delegated by Congress to the President. The Falcons also raised the delegation argument in the proceeding below, and the court, relying on *Meat Cutters*, upheld the constitutionality of the Act. Yet, the Temporary Court eviscerated the very safeguard of judicial review upon which *Meat Cutters* relied by adopting the aberrant "great deference" standard which the Falcons now ask this Court to review.

tive construction of the Act. In that case, the Price Administrator had ruled that public warehouses were not "public utilities" whose rates were exempted from price controls under the Emergency Price Control Act and the General Maximum Price Regulation issued pursuant thereto by the Administrator. In a lengthy opinion, the Emergency Court of Appeals sustained the ruling of the Price Administrator, citing in support of its conclusion, the ordinary meaning of the term "public utilites" as not including warehouses, the need for nationwide uniformity in the administration of price regulations (it was the Davies' contention that the courts should follow the state law in California which regulated warehousemen's prices as "public utilities"), the existence of a wartime emergency, and the fact that the Price Administrator had himself made a contemporaneous construction of the Act immediately after its passage as excluding utilities, but not warehouses. *Davies Warehouse Co. v. Brown*, 137 F.2d 201 (Emer. Ct. App. 1943). Of particular significance to this case was the ruling of the Emergency Court in which it said:

> Finally, we cannot overlook the fact that by Amendment No. 1 to Supplemental Regulation No. 11, the Price Administrator granted complete exemption to nine classes of common carriers and other public utilities without any regard to their status as to existing rate regulation [but which did not exempt warehouses.] This contemporaneous administrative construction of the scope of the exemption appears to have met with the approval of the Congress, for in Section 1 of the amendatory act of October 2, 1942....

137 F.2d at 206. In reversing the Emergency Court of Appeals, the Supreme Court specifically addressed itself to the contention that it should defer to the Administrator's contemporaneous construction of the Act as reflected by his regulations. Mr. Justice Jackson said:

> Lastly, it is contended that we should accept the Administrator's view in deference to administrative construction. The administrative ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense in this case. It has hardly seasoned or broadened into a settled administrative practice. If Congress had deemed it necessary or even appropriate that the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so. We do not think it should overweigh the considerations we have set forth as to the proper construction of the statute.

321 U.S. at 156.

This Court has repeatedly held in other cases that "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . ." *American Ship Buildng Co. v. NLRB*, 380 U.S. 300, 318 (1965), and that the validity of any administrative action is a question for the independent determination by the federal courts. *See, e.g., NLRB v. Brown*, 380 U.S. 278, 290-91 (1965). The *American Ship Building* case and *NLRB v. Brown* involved adjudicative determinations of the NLRB made after lengthy evidentiary hearings before the agency (something which was not available here), which had condemned employers' conduct as unfair labor practices. In each case, the Courts of Appeals had made independent determinations of the issues, and had denied enforcement of the orders. Before this Court, it was the Government's contention that the lower courts should not have made an independent determination of the issues, but should have deferred to the expert judgment of the NLRB. Although the NLRB has proven itself to be far more competent and successful in administering the labor laws of the United States than were either the OEP and the Cost of Living Council in administering the Economy, this

Court emphatically refused to defer to the agency's rulings and made an independent determination that the administrative rulings were invalid.

The decision below is at odds with the standard of judicial review established by this Court and reflected by its decision in the *Davis Warehouse* case, *NLRB v. Brown*, and by a long series of other cases involving regulatory schemes of equal or greater complexity than that established by the Executive Order. *See Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960) (FPC); *Social Security Board v. Nierotko*, 327 U.S. 358, 368-69 (1946); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953). The teaching of these cases is that the federal courts are not obligated to sit by passively out of deference to agency interpretations, but are obligated to make an independent determination as to whether the administrative position is right or wrong.

A further illustration of the extent to which the ruling of the Temporary Court is out of step with prior rulings of this Court defining the relationship of the courts to the administrative process is the fact that the Temporary Court has enforced an administrative guideline which consisted of a single conclusory sentence in Circular 11 despite the fact that it was unaccompanied by either findings or a statement of reasons to explain or justify the OEP's conclusion.

The Temporary Court lost sight of the fact that such informal "guides" as those represented by Circular 11 issued by administrative agencies are not entitled to the same weight as substantive legislative rules or adjudicatory determinations which are published after extensive investigations, hearings and studies by the agencies. This Court has repeatedly held that such "guides" are no more than statements of someone's opinion as to the meaning of a controlling statute (or as in this case an Executive

Order having the force of statute) and are not entitled to any special weight beyond the "thoroughness evident in its consideration, validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade . . ." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Haggar Co. v. Helvering*, 308 U.S. 389, 398 (1940).

This Court has repeatedly held since the *Chenery* case that, even in areas of agency discretion, a statement of the grounds for agency action is an essential prerequisite to judicial review and enforcement — without a statement of grounds, judicial enforcement of agency action must be denied. As this Court emphasized:

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make must judge the propriety of such action solely on the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action. . . .

SEC v. Chenery Corp., 332 U.S. 194, 196 (1943). This Court has also held that the grounds for agency action must be stated by the agency itself *on the record.* "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *accord, FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). As the Temporary Court acknowledged in the *Southern California* case, Circular 11 stands alone without any statement of grounds for the extraordinary ruling of the OEP. *See* 472 F.2d at 1072 & n.12.

In summary, it is apparent that the Temporary Court was awed by what it believed to be the enormity of the task and the expertise of the OEP in administering the program of economic controls, and mutely accepted the OEP's unexplained interpretation of the Executive Order without

requiring even the most basic statement of grounds for the agency's position which were an essential prerequisite to meaningful judicial review. In uncritically accepting the OEP's interpretation, the Temporary Court disregarded this Court's warning that, although

> [e]xpert discretion is the lifeblood of the administrative process, . . . 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no pratical limits on its discretion'.

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962).

Since the OEP's interpretation of the Executive Order is unsupported by any record statement of the findings or reasons on which it was based, certiorari should be granted and enforcement of this interpretation against the Browns should be denied. *SEC v. Chenery Corp., supra; FTC v. Sperry & Hutchinson Co., supra.* Alternatively, the case should be summarily remanded to the lower court with directions that Circular 11 be disregarded, and that it make its "own independent determination of the correct application of the governing principles," *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960), to the Browns' ticket sales, under proper standards of judicial review, uninfluenced by the exaggerated "great deference" rule which was misapplied by the Temporary Court in this and other cases.

III.

THE CONSTRUCTION BY THE TEMPORARY EMERGENCY COURT OF APPEALS OF EXECUTIVE ORDER 11615 REQUIRING BROWNS TO REFUND AMOUNTS RECEIVED PRIOR TO AUGUST 15, 1971 VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS AND THE TAKING OF PROPERTY WITHOUT JUST COMPENSATION, IN CONFLICT WITH DECISIONS OF THIS COURT.

The constitutional prohibition against *ex post facto* laws is clear and such laws have been defined by this Court as follows:

> "The state legislature can pass no ex post facto law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1809).

The Temporary Emergency Court of Appeals in *DeRieux* took the position that the Executive Order could not be said to "punish" The Five Smiths within the meaning of the cited cases. Browns contend that the case most nearly in point, *Burgess v. Salmon*, 97 U.S. (7 Otto) 381, 24 L.Ed. 1104 (1878) was improperly ignored by the TECA.

In *Burgess*, a tobacco merchant taxpayer brought a civil suit for refund against the Collector of Internal Revenue allegating that during the morning of March 3, 1875, he had sold and delivered a quantity of tobacco when the transfer tax on tobacco was 20 cents per pound. In the afternoon of March 3rd the President signed an amendment to the tax statute increasing the rate to 24 cents per pound. The merchant then paid the additional tax and sough his refund.

This Court held that the application of the amendment to the sale and delivery of tobacco prior to its effective date constituted an *ex post facto* law and stated:

> "To impose upon the owner of the goods a criminal punishment, or a penalty of $377 for not paying an additional tax of four cents a pound, would subject him to the operation of an ex post facto law.

> An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. *Carpenter v. Pa.*, 17 How., 456.
>
> Had the proceeding against Salmon & Hancock been taken by indictment instead of suit for the excess of the tax, and the one was equally authorized with the other, the proceeding would certainly have fallen within the description of an ex post facto law." 97 U.S. 384, 24 L. Ed. 1106.

The analogy to the instant case is clear. That is, prior to the effective date of the Executive Order, Browns had sold and delivered over 48,000 season tickets and had received payment therefor. To require Browns to now refund a portion of the consideration received flies in the teeth of the above holding.

The holding of the TECA likewise disregards the holding of this Court in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 79 L. Ed. 1593 (1935) wherein the Court unanimously held the Frazier-Lemke Act to be an unconstitutional taking of mortgagees' property rights without payment of just compensation as it applied to existing mortgages. *Joint Stock Land Bank* further clearly held that the extent of pre-existing property rights held by the parties thereto was a question of pre-existing state law.

Although there appear to be no Ohio cases directly in point, it is the well-established rule in a majority of jurisdictions in the United States that a ticket to a sports event is a revocable *license*, which carries with it no obligation on the part of the team to do anything – not even to play the game. If the game is not played, the only obligation of the team is to refund the purchase price of the tickets to the holder. Thus, the sale of a football ticket is not a contract to perform future services by playing a game, but a sale of a commodity. See, e.g., *Jordan v.*

Concho Theatres, 160 S.W. 2d 275, 276 (Tex. Civ. App. 1941). See also, 86 C.J.S., *Theaters & Shows* Section 35 (1954).

Thus, prior to August 15, 1971, the Browns had the unqualified title to monies received from purchasers of season tickets that all purveyors of goods have once they have parted with their wares, that is, an absolute right to use the funds subject only to a claim by the purchaser in the event there is a failure of consideration. Such rights were vested within the meaning of the *Joint Stock Land Bank* case and the requirement that Browns refund a portion of the funds amounts to the taking of property without just compensation in derogation of both the Constitution and the decisions of this Court.

IV

THE ORDER OF THE LOWER COURT REQUIRING PETITIONER TO MAKE RESTITUTION BY REDUCING THE PRICE OF ITS TICKETS FOR FUTURE GAMES TO ACCOUNT FOR THE PROCEEDS OF PHASE I SALES BY PURCHASERS WHO ARE PRESENTLY UNIDENTIFIABLE IS AN ABUSE OF COURT'S EQUITABLE POWERS.

After granting the appellee's Motion for Summary Judgment, the District Court entered the following Order:

> "IT IS FURTHER ORDERED that, as a part hereof, defendant shall forthwith make restitution: (a) by refunding all unlawful overcharges to the affected identifiable 1971 season ticket purchasers; or (b) as to 1971 season ticketholders who purchase 1974 season tickets, said refund may be credited against the 1974 purchase price in lieu of being directly refunded. Where ticket purchasers are not identifiable, i.e., unidentifiable season ticketholders and/or single-game ticket purchasers, defendant shall make restitution by reducing ticket prices for box office sales at home games during the 1974 football season by an amount equal to the difference between the aggregate

overcharge and the amount refunded to identifiable ticketholders, until the total amount of reimbursements due unidentifiable ticket purchasers is exhausted."

If the Browns are required to comply with Paragraph (b) of the District Court's Order, the net effect will be that many ticket purchasers will receive a "double recovery". The identification of the 1971 season ticketholders (some 48,000 persons) is a matter of record. In addition thereto, pursuant to the announcements made during Phase I by the Browns at the games, and also carried in the Cleveland newspapers, many fans retained their stubs, and upon presentation thereof, refund of the overcharge will be made to these purchasers. Assuming, however, that persons who purchased individual game tickets do not claim their refund, and the Browns are therefore required to reduce their ticket prices to account for the amount of the refunds not claimed, the season ticketholders and those single game purchasers of tickets who have received their refunds, will then receive a "second recovery" when they purchase Browns' tickets at such reduced prices. This theory of recovery, sometimes referred to as "fluid recovery" has been rejected in antitrust class action cases. See, *Eisen v. Carslisle & Jacquelin*, 479 F. 2d 1005 (2nd Cir., 1973). In addition to permitting many purchasers to receive a double recovery, future ticket purchasers who were not involved in Phase I sales will receive a reduction in the price of tickets – without having any legal claim to such reduction. While it is recognized that the lower court has inherent equitable powers, such powers have never included the discretion to award "double recovery" to parties who claim their rights have been infringed, and certainly does not include the power to award damages, via a price reduction, to parties whose rights were not infringed upon.

CONCLUSION

For all of the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Temporary Emergency Court of Appeals.

Respectfully submitted,

THOMAS P. MEANEY, JR.
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(216) 771-2700

OF COUNSEL:
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CERTIFICATE OF SERVICE

I, Thomas P. Meaney, Jr., counsel for Petitioner, Cleveland Browns, Inc., do hereby certify that I have on this date served the Respondent, United States of America, with copies of the within Petition by mailing three copies thereof to each of the parties listed below, via United States mail, in envelopes containing adequate postage, addressed as follows:

Solicitor General of the United States
United States Department of Justice
Washington, D. C. 20530

and

Mr. Paul T. Michael, Attorney
United States Department of Justice
Room 3334
10 Constitution Avenue
Washington, D. C. 20530

This 12th day of October, 1974.

THOMAS P MEANEY, JR.
Counsel for Petitioner

Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* vs. CLEVELAND BROWNS, INC., *Defendant.*	No. C73-839 Order

[Filed July 2, 1974]

In accordance with the Order filed herein on July 1, 1974,

IT IS ORDERED that the motion of plaintiff herein for summary judgment is granted.

IT IS FURTHER ORDERED that, as a part hereof, defendant shall forthwith make restitution: (a) by refunding all unlawful overcharges to the affected identifiable 1971 season ticket purchasers; or (b) as to 1971 season ticketholders who purchase 1974 season tickets, said refund may be credited against the 1974 purchase price in lieu of being directly refunded. Where ticket purchasers are not identifiable, i.e., unidentifiable season ticketholders and/or single-game ticket purchasers, defendant shall make restitution by reducing ticket prices for box office sales at home games during the 1974 football season by an amount equal to the difference between the aggregate overcharge and the amount refunded to identifiable ticket holders, until the total amount of reimbursements due unidentifiable ticket purchasers is exhausted.

ROBERT B. KRUPANSKY
United States District Judge

Appendix A-1

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD R. BECKER, et al and UNITED STATES OF AMERICA, *Plaintiffs,* vs. CLEVELAND BROWNS, INC., *Defendants.*	**Civil Action Nos. C72-1079, C73-839** **Order**

[Filed July 1, 1974]

KRUPANSKY, J.

Plaintiff, Edward R. Becker, a Cleveland Browns season ticket holder, brings this action on behalf of himself and others similarly situated, to recover allegedly unlawful overcharges arising from increased prices demanded by defendant Cleveland Browns, Inc., for admission tickets to the 1971 football season home games. The Complaint, as amended, alleges that the defendant's actions violated "Phase I" price regulations promulgated pursuant to the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1901 *et seq.* (the Act).

Subsequent to the filing of plaintiff Becker's action, the United States of America filed a Complaint against defendant Cleveland Browns, Inc., alleging similar violations of the Act, and requesting relief for all ticket purchasers, including those plaintiff Becker purports to represent. The Court has consolidated both actions pursuant to Rule 42(a), Fed. R. Civ. P.

The parties have submitted extensive stipulations of fact and the matter is presently before the Court on the Motions of defendant Cleveland Browns, Inc. in Case No.

C72-1079 to dismiss for failure to state a claim upon which relief can be granted, and plaintiff United States of America in Case No. C73-839 for Summary Judgment.

The issues raised by the stipulations herein and the legal arguments advanced by the parties hereto, are substantially identical to those presented to the Temporary Emergency Court of Appeals in the case of De Rieux v. The *Five Smiths, Inc.*, decided on June 20, 1974. Accordingly, this Court adopts the decision therein and finds:

1. Plaintiff Becker's Complaint in Case No. C72-1079 fails to state a claim upon which relief can be granted for the reason that the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1901 *et seq.*, does not contemplate a private right of action for damages. Fed. R. Civ. P. 12(b)(6); *De Rieux v. The Five Smiths, Inc.*, T.E.C.A. Nos. 5-6, 5-7, 5-8 (June 20, 1974); *Fagundez v. Oakland Raiders Professional Football Club*, N.D. Calif. (No. C71-2111 RFP, January 2, 1974), *aff'd*, T.E.C.A. No. 9-10 (June 24, 1974).

2. There being no genuine issue as to any material fact herein, plaintiff United States of America in Case No. C73-839 is entitled to judgment as a matter of law for the reason that the increased ticket prices demanded by defendant Cleveland Browns, Inc., for admission tickets to the 1971 football season home games constituted unlawful overcharges in contravention of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1901 *et seq.*, Executive Order 11615, and regulations and guidelines promulgated pursuant thereto. *De Rieux v. The Five Smiths, Inc., supra; Manning v. University of Notre Dame*, 484 F.2d 501 (T.E.C.A. 1973); *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (T.E.C.A. 1972), *cert. denied*, 410 U.S. 928 (1973); *Amalgamated Meat Cutters & Butchers Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

3. Defendant Cleveland Browns, Inc. sold a total of 454,793 tickets for home games played during

"Phase I" (August 15 - November 13, 1971) at an increased rate over prices charged for home games during the 1970 football season, constituting unlawful overcharges in the total amount of $561,539.

In accordance with the foregoing, It Is ORDERED that:

1. Plaintiff Becker's Complaint in Case No. C72-1079 is hereby dismissed.

2. The Motion of the United States of America for Summary Judgment in Case No. C73-839 is granted.

3. As a part hereof, defendant Cleveland Browns, Inc., shall forthwith make restitution: (a) by refunding all unlawful overcharges to the affected identifiable 1971 season ticket purchasers; or (b) as to 1971 season ticketholders who purchase 1974 season tickets, said refund may be credited against the 1974 purchase price in lieu of being directly refunded. Where ticket purchasers are not identifiable, i.e., unidentifiable season ticketholders and/or single-game ticket purchasers, defendant shall make restitution by reducing ticket prices for box office sales at home games during the 1974 football season by an amount equal to the difference between the aggregate overcharge and the amount refunded to identifiable ticket holders, until the total amount of reimbursements due unidentifiable ticket purchasers is exhausted.

IT IS SO ORDERED.

ROBERT B. KRUPANSKY
United States District Judge

Appendix B

Temporary Emergency Court of Appeals
of the United States

Before Honorable Edward Allen Tamm, Chief Judge, Honorable Robert P. Anderson and Honorable Frank M. Johnson, Jr., Judges

United States of America,
Plaintiff-Appellee,
v.
Cleveland Browns, Inc.,
Defendant-Appellant.
No. 6-7

[Filed September 13, 1974]

Thomas P. Meaney, Jr., Burke, Haber & Berick, Cleveland, Ohio for the Appellant.

Carla A. Hills, Assistant Attorney General, Stanley D. Rose and Paul T. Michael, Department of Justice, Washington, D. C. for the Appellee.

ORDER OF AFFIRMANCE UNDER RULE 28

Upon consideration of Appellee's Motion to Affirm and brief in support thereof and Appellant's Answer,

IT IS ORDERED that the judgment of the District Court is *AFFIRMED* on the authority of *Oakland Raiders v. Office of Emergency Preparedness,* No. 9-11 (T.E.C.A., July 10, 1974); *DeRieux v. The Five Smiths, Inc.,* Nos. 5-6, 5-7 and 5-8 (T.E.C.A., June 20, 1974) and *University of Southern California v. C.O.L.C.,* 472 F.2d 1065, *cert. denied,* 410 U.S. 928.

Appendix C

Temporary Emergency Court of Appeals
of the United States

Burt DeRieux, et al., *Plaintiff-Appellee,* vs. The Five Smiths, Inc., *Defendant-Appellant.*	No. 5-6
The Five Smiths, Inc., *Plaintiff-Appellant,* vs. William H. Holloway, et al., *Defendants-Appellees.*	No. 5-7
United States of America, *Plaintiff-Appellee,* vs. The Five Smiths, Inc., *Defendant-Appellant.*	No. 5-8

[Filed June 20, 1974]

Emmet J. Bondurant, Kilpatrick, Cody, Rogers, McClatchey & Regenstein (Martin E. Kilpatrick, Matthew H. Patton and Susan Cahoon, on the brief) for appellant The Five Smiths, Inc.

James A. Eichelberger, Greene, Buckley, DeRieux & Jones, for appellee Burt DeRieux.

Paul T. Michael, Attorney, United States Department of Justice (Carla A. Hills, Assistant Attorney General, and Stanley D. Rose, Attorney, Department of Justice, on the brief) for appellee United States of America.

Before TAMM, Chief Judge, VAN OOSTERHOUT and HASTINGS, Judge:

These consolidated cases are before us pursuant to § 211(c) of the Economic Stabilization Act of 1970, as amended[1] (the amended Act), upon certification by the district court of substantial constitutional issues. We granted the joint motion of the parties to have the entire cases in Nos. 5-7 and 5-8 presented to us for consideration, and subsequently ordered that No. 5-6 be consolidated therewith. Since it now appears that all facts necessary for a complete adjudication of this controversy have been stipulated,[2] we shall exercise our discretion under § 211(c) to decide the cases in their entirety at this time.[3]

At the heart of all three cases is a single question: did the Atlanta Falcons professional football team violate the Economic Stabilization Act by playing football games during the "Phase I" price freeze at prices which exceeded those charged for games played during 1970? Phase I was initiated by Executive Order 11615, 36 Fed. Reg. 15727 (1971), and was effective during the 90-day period from August 15 through November 13, 1971.

The Five Smiths, Inc. (the Falcons) operate the Atlanta Falcons as a member of the National Football League (NFL). In No. 5-6, the Falcons are defendant in a class action brought by Burt DeRieux, an Atlanta lawyer, on behalf of all season ticket holders for the 1971 Falcons football season. DeRieux originally sought reimbursement

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[1]12 U.S.C.A. § 1904 n. (Supp. 1974).

[2]The parties have jointly filed a stipulation of facts, with exhibits, to which plaintiff in No. 5-6 has filed a "caveat" reserving the right to present evidence on particular issues.

[3]See *United States v. Ohio*, T.E.C.A., 487 F.2d 936, 938 (1973), *cert. granted*, 42 U.S.L.W. 3457 (Feb. 19, 1974); *National Petroleum Refiners Association v. Dunlop, T.E.C.A.*, 486 F.2d 1388, 1391-1392 (1973).

of illegal overcharges. By amendment to the complaint he now additionally seeks treble damages, attorneys fees and costs under § 210(b) of the amended Act.

No. 5-7 is an action by the Falcons against the Office of Emergency Preparedness (OEP), its Director and Regional Director, the Cost of Living Council (CLC), the Executive Director and individual members of the CLC, and the Commissioner of Internal Revenue. The complaint seeks declaratory and injunctive relief against the application and enforcement of the Phase I freeze with respect to Falcons 1971 football ticket prices.

Finally, No. 5-8 was brought by the United States pursuant to § 205 of the original Economic Stabilization Act of 1970[4] (the 1970 Act), to enjoin ticket price violations and to require the Falcons to refund amounts already illegally received.

The docket numbers of the cases reflect the order in which they were filed during September, 1971, all in the Northern District of Georgia. Proceedings in all three cases eventually were stayed, by agreement of the parties, pending the outcome of similar litigation involving University of Southern California season football tickets. See *University of Southern California v. Cost of Living Council*, T.E.C.A., 472 F.2d 1065 (1972). A petition for certiorari in *University of Southern California* was denied by the Supreme Court on February 20, 1973. 410 U.S. 928. Thereafter, the Government filed motions for summary judgment in Nos. 5-7 and 5-8. Without reaching the merits of the motions, the district court on February 6, 1974 certified the constitutional issues in all three cases to this court.

In 1970, the Falcons' management decided to raise ticket prices for home games during the 1971 football season. The price increases were announced in January, 1971, and amounted to $1.50 and $2.50 per game, depend-

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[4]Pub. L. 91-379, 84 Stat. 796 (Aug. 15, 1970).

ing upon seat location. Prices were not raised for a few "ground" and "field level" seats; however, such seats represented a small percentage of the 58,000-seat capacity of Atlanta Stadium. Sales of season tickets at the new prices were commenced on February 1, 1971, at which time the Falcons mailed order forms for 1971 season tickets to past season ticket holders. By the end of June, 41,590 season tickets had been sold and fully paid for. These tickets were mailed to purchasers on August 2, 1971, and all were delivered prior to August 15, the date the freeze went into effect.

The Falcons played five home games during the freeze, the first of which was a pre-season "exhibition" game. Unlike many NFL teams, the Falcons did not play any exhibition games at home prior to August 15. Of the total number of individual game tickets eventually sold for the five games played during the freeze, 217,151 were sold prior to August 15 (mostly in the form of season tickets) and 45,601 were sold thereafter. The amount of revenue from these five games which is attributable to the challenged price increases is $407,912.00. It is this sum (trebled in No. 5-6)[5] which is the subject of the present litigation.

The Falcons' argument before this court may fairly be described as a frontal assault upon two decisions which have become fixtures in the scheme of economic stabilization law. *Amalgamated Meat Cutters & Butcher Workmen v. Connally,* D.D.C., 337 F. Supp. 737 (1971) (*Meat Cutters*), decided by a three-judge district court prior to the establishment of the Temporary Emergency Court of Appeals, upheld the constitutionality of the Economic Stabilization Act as it existed in August, 1971, when Phase I was initiated. Even more fundamental to the develop-

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[5]Possibly because DeRieux purports to represent season ticket holders only, the recovery sought in 5-6 is somewhat less than three times the $407,912.00 figure.

ment of the law of this court has been *University of Southern California v. Cost of Living Council, supra* (*USC*). The rather narrow issue decided in that case—whether the Phase I freeze applied to tickets sold prior to the freeze for sporting events occurring during the freeze—apparently has not been laid to rest. See *Manning v. University of Notre Dame Du Lac,* T.E.C.A., 484 F.2d 501 (1973); *Oakland Raiders v. Office of Emergency Preparedness,* N.D. Calif. (No. C-71-2213, Jan. 2, 1974), *appeal docketed,* T.E.C.A. No. 9-11 (March 21, 1974); and *cf. Murphy v. O'Brien,* T.E.C.A., 485 F.2d 671 (1973). Broader reliance has come to be placed upon a more general aspect of *USC,* namely, the opinion's analysis and application of the "great deference test" in the context of economic controls administration. *USC, supra,* pp. 1068-1069. See *United States v. IBEW Local 11,* T.E.C.A., 475 F.2d 1204, 1209 (1973); *Plumbers Local 159 v. Construction Industry Stabilization Committee,* T.E.C.A., 479 F.2d 1052, 1056 (1973); *Baldwin County Electric Membership Corp. v. Price Commission,* T.E.C.A., 481 F.2d 920, 923, *cert. denied,* 414 U.S. 909 (1973); *Pacific Coast Meat Jobbers Association, Inc. v. Cost of Living Council,* T.E.C.A., 481 F.2d 1388, 1392 (1973); *Murphy v. O'Brien, supra,* p. 674; *City of Groton v. Federal Power Commission,* T.E.C.A., 487 F.2d 927, 934 (1973); *United States v. Ohio,* T.E.C.A., 487 F.2d 936, 941 (1973), *cert. granted,* ..... U.S. ..... (Feb. 19, 1974). See also *United States v. Lieb,* T.E.C.A., 462 F.2d 1161, 1166 (1972), decided prior to *USC.*

In arguing that *Meat Cutters* and *USC* were wrongly decided, the Falcons offer five contentions which form the principal issues common to all three cases now under consideration:

(1) Properly interpreted, Executive Order 11615 does not forbid these price increases;

(2) The Economic Stabilization Act of 1970, as it existed during Phase I, represents an unconstitutional delegation of legislative authority to the executive branch of the Government;

(3) Executive Order 11615 violated § 202(b) of the Economic Stabilization Act;

(4) Executive Order 11615 and the regulations issued thereunder violated § 553 of the Administrative Procedure Act; and

(5) The application of Executive Order 11615 to forbid these price increases represents (a) an unconstitutional bill of attainder or *ex post facto* law; (b) an unconstitutional taking of property without just compensation; and (c) an unconstitutional deprivation of due process of law.

No. 5-6 raises a sixth issue, namely, whether either the 1970 Act or the December 22, 1971 amendments thereto[6] (the 1971 Amendments) created a private right of action to recover for Phase I price violations occurring prior to the enactment of the amendments.

Issues 1 and 2 only were actually litigated in *USC* and *Meat Cutters*. With respect to such issues, the Falcons urge that we overrule *USC* and refuse to follow *Meat Cutters*. The Falcons have mounted their attack with skill and resolve, as evidenced by their principal brief of 155 pages. Still, we are not persuaded. We have concluded that the Falcons violated a lawful Executive Order issued pursuant to a constitutional statute, and that the ticket price increases must be refunded.

We have further concluded in No. 5-6 that violations of the Order which occurred during the Phase I freeze period are not subject to private actions by individual or class plaintiffs.

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[6]Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743.

Executive Order 11615 and the relevant regulations and interpretations issued thereunder are fully described in the *USC* opinion, 472 F.2d at 1066-1067. We have set out the pertinent section of the Order below.[7] In brief, the Order established a 90-day freeze on prices, rents, wages and salaries, effective August 15, 1971. Permissible price levels were to be determined by reference to the nearest preceding 30-day period during which a "substantial volume of actual transactions" had occurred. Since the Falcons had not played any home football games during the 30 days preceding August 15, the definition of "actual transactions" became crucial in determining the proper "ceiling price" for their upcoming games. If a football game "transaction" did not "occur" until the games were actually played, the ticket price charged during the 1970 season would establish the proper ceiling price for 1971 games.

Cost of Living Council Order No. 1, 36 Fed. Reg. 16215 (Aug. 20, 1971), delegated the CLC's authority to implement the Order to the OEP. Subsequently, the OEP issued Economic Stabilization Regulation No. 1, 36 Fed. Reg. 16515 (Aug. 21, 1971, which elaborated on the re-

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[7]"Section 1. (a) Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise."

quirements of Executive Order 11615, but was nevertheless "very brief and basic in content." *USC* at 1067. The Regulation defined various terms contained in the Order and Regulation, but did not define the phrase, "actual transactions." By amendment dated August 24, 1971, the Regulation announced that the OEP would from time to time issue "circular containing implementing instructional material." Circular No. 7, issued September 2, stated that a service transaction occurs "when the service is performed." Nine days later, in Circular No. 11, the OEP issued the statement which was to become the focal point of the *USC* case:

> "The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze."

In *USC* we held that the "implied assertion that a sporting event constituted a service," and the conclusion in Circular No. 11 that the freeze applied to advance sale tickets for sporting events, represented "a reasonable and consistent interpretation of the Executive Order, and one entitled to this court's respect." 472 F.2d at 1072.

1. *Did USC correctly interpret Executive Order 11615?*

The Falcons advance two interpretative arguments. First, they argue that the sale and delivery of the season tickets prior to August 15 constituted completed transactions within the meaning of the Executive Order and Regulation. If so, the Falcons would have been entitled both to retain the full amounts already received and to charge an equally high price for tickets sold after August 15 (since the pre-freeze sales would have established the proper ceiling price). Second, in the alternative, they contend that irrespective of whether a higher ceiling price was established prior to August 15, the Falcons did not "charge, assess or receive" a price after August 15 with

respect to some 41,000 season tickets and therefore the prices of those tickets were exempt from the freeze.

It is conceded that *USC* fully disposed of the first argument adversely to the Falcons. As for their second contention, the Falcons urge that the *USC* court was not presented with the precise argument here put forward. In fact, in Part IV of *USC*, pp. 1069-1070, the court specifically considered and rejected a retroactivity argument. While it is unclear whether the words "charge, assess, or receive" were there given the forceful emphasis accorded them by the Falcons, it is beyond dispute that *USC* undertook to authoritatively interpret the Executive Order in light of a nearly identical set of facts. The Falcons have not brought to our attention any additional factors (such as legislative history) which were not presented in *USC*. They rely entirely upon the text of the Order itself, the relevant portion of which comprises a single paragraph. Under these circumstances, *USC* must be regarded as dispositive of both interpretative arguments here raised.

We subscribe fully to the reasoning and holding of *USC*, and deem it unnecessary to repeat what was set forth in that opinion. In light of Falcons' strenuous effort to upset *USC*, and because of one factual difference based on the Falcons' status as a *professional* football team, some additional comments directed to two of their arguments are nevertheless appropriate.

First: The Falcons generally urge that the OEP position with regard to ticket prices was inconsistent with its rulings in other areas, *e.g.*, university tuition, and that even the ticket price policy was reversed for purposes of Phase II. The identical arguments were considered and rejected in *USC* (pp. 1071-1072). We merely note that when the agency was again required to implement a general price freeze at the outset of Phase IV, as opposed to the more flexible system of controls represented by Phase

II, it once again interpreted the freeze to apply to advance ticket sales. See CLC Freeze Group Questions and Answers Release No. 4, 38 Fed. Reg. 16651 (1973); and *cf. Murphy v. O'Brien, supra.*

The Falcons also contend that they were subject to a particular inconsistency with regard to the salaries paid to their football players. Falcons players were employed under two separate contracts. The first was a collective bargaining agreement negotiated by the players' union, the NFL Players Association. This agreement established, *inter alia,* the pay schedule for the 1971 pre-season "exhibition" games. The second agreement was the "standard player contract," the salary provisions of which varied and which were negotiated on an individual player basis. The standard player contract provided compensation for the players' services during the regular season of football play. Prior to August 15, the Falcons agreed to pay $117,300 in increased salaries under standard player contracts.

Sometime subsequent to September 7, 1971, OEP Director George A. Lincoln issued an interpretative ruling to the NFL Players Association. The ruling recited that "[a]ccording to a decision of the CLC on September 7, 1971," players who were already in training camps prior to August 15 under 1971 standard player contracts were entitled to receive any increases prescribed therein. We have not been informed of any effort by the Falcons to contest this ruling. The Falcons now argue, however, that the ruling has placed the OEP "in the incongruous position of advocating a price freeze on the sale of tickets without a corresponding wage freeze on the salaries of the players who performed in the same games."

In USC, we stated that "[i]f the haste necessitated [by the freeze] gave rise to unreasonable inconsistencies in the administrative interpretations, or to actions plainly without the purpose and scope of the Order, then we will readily rectify them." 472 F.2d at 1069. We cannot say

that the alleged disparity here represents an unreasonable inconsistency in the agency's administration of the Order. It is clear that the standard player contract was not limited to the regular football season.[8] Conversely, in addition to setting salaries for preseason games, the collective agreement established minimum salaries for the regular season as well. The collective agreement contemplated, and indeed required, the signing of individual standard player contracts. The two agreements thus covered different aspects of a single perior of employment. Under the OEP ruling, salary provisions contained in the player contracts escaped the freeze only if performance of this single employment service was begun prior to August 15. In sum, the continuing service required of a football player under these contracts is sufficiently different from the discrete services performed by the Falcons – *i.e.*, performance of football games – to justify this result.

Second: The Falcons argue that *USC* erroneously focused on the provisions of the Executive Order which relate to ceiling price, and ignored the portion of the Order which describes the actual conduct to be prohibited. The language relied upon is contained in the third sentence of § 1(a) of the Order, quoted *supra* n. 7. In pertinent part, the third sentence provides that "[n]o person shall charge, assess, or receive * * * in any transaction

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[8]Paragraph 1 of the contract provides that "[t]he term of this contract shall be from the date of execution hereof * * *." The OEP ruling was expressly limited to players "who have signed 1971 contracts." Paragraph 2 of the contract recites the player's agreement "during the term of this contract to report promptly for the Club's training sessions and, at the Club's direction, to render his full time services during such training sessions and to participate in all practice sessions and in all League and other football games scheduled for or by the Club." Further, Paragraph 3 expressly provides that the Club shall pay board, lodging and travel expenses for away-from-home training or games during the pre-season period.

prices * * * in any form higher than those permitted hereunder * * *." Closely related to this contention is the argument that *USC* erred in according "great deference" to an agency interpretation which is in alleged conflict with the clear meaning of the quoted language. That meaning, the Falcons assert, is that prices which have been fully collected prior to August 15 are beyond the Order's reach.

We begin by emphasizing that there is textual support for the OEP's interpretation of the Order, the Falcons' contention to the contrary notwithstanding. The Order proscribes higher prices "in any transaction." For ceiling price purposes, the Order expressly looks to price "pertaining to * * * actual transactions." It is not unreasonable to construe the third sentence of the Order to incorporate this same concept, *i.e.*, to proscribe higher prices which pertain to future transactions, even though payment may already have been conditionally received. Just as a service transaction may reasonably be said to "occur" at the time of performance, a price may be deemed to be "charged" as of that same date. *Cf.* CLC Release No. 4, *supra*, 38 Fed. Reg. 16651. This is particularly true when it is realized that under the Falcons' alternative interpretation, patrons who had purchased tickets well in advance of the freeze would pay higher prices to sit side by side with fans who bought tickets after August 15. Thus, even if we were to yield to the Falcons' insistence that we interpret the Order *de novo*, it is not at all clear that we would reach a result different from that of the OEP.

The point of *USC* was that such a *de novo* analysis by the courts is both unnecessary and improper. "In delegating to the agencies the duty to develop the very definitions of the words used in the Order, the broadest possible delegation of power was given." *USC* at 1068. The delegation by the 1970 Act itself was no less broad. Congress, in § 202(a), had said only that prices might not

be reduced below the levels of May 25, 1970.[9] See *USC* at 1070. It is no abdication of our constitutional role for this court to recognize the breadth of the delegations involved in this particular statute and this particular Order. The Supreme Court has stated in the context of an earlier price control statute that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).[10] As discussed above and as fully explained in *USC*, Circular No. 11 was not "plainly erroneous or inconsistent" with Executive Order 11615. Accordingly, we hold once again that such ticket price increases violated the Executive Order.

2. *Was the 1970 Act an unconstitutional delegation of legislative power?*

Relying upon *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the Falcons urge that the 1970 Act is void as representing an unconstitutional delegation of legislative power to the President. It is conceded that subsequent to *Schechter*, no federal statute had

[9]"§ 202. Presidential authority

(a) The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities."

[10]The Falcons emphasize that the cited quotation is followed by this sentence: "The legality of the result reached by this process, of course, is quite a different matter." The "legality" referred to is the regulation's validity under the enabling statute and the Constitution. 325 U.S. at 414, 418-419. As noted above, the Act itself requiries only that prices be stabilized at levels not below those of May 25, 1970. The *constitutional* validity of the Order as interpreted and applied is discussed elsewhere in this opinion.

been held unconstitutional by the Supreme Court on that basis. Among the statutes to survive a delegation challenge was the Emergency Price Control Act of 1942. *Yakus v. United States,* 321 U.S. 414 (1944).

In *Amalgamated Meat Cutters & Butcher Workmen v. Connally,* D.D.C., 337 F. Supp. 737 (1971), *supra,* a three-judge court upheld the 1970 Act in the face of a delegation challenge. Several other district courts have reached the same result.[11] The exhaustive and learned opinion by Judge Leventhal in *Meat Cutters* has been favorably cited by this court on several occasions. See *United States v. Lieb, supra,* p. 1165; *USC, supra,* p. 1070; *IBEW Local 11 v. Boldt,* T.E.C.A., 481 F.2d 1392, 1395, *cert. denied,* 414 U.S. 1092 (1973). It appears, however, that this is the first occasion upon which our court has been called to directly decide the delegation question. This likely is due in part to the fact that the 1971 Amendments appear to have eliminated any doubt as to the Act's validity under Article I of the Constitution.

We are in substantial agreement with the reasoning of *Meat Cutters,* and concur in the result there reached. It would serve only to unduly prolong this opinion were we to further elaborate our views on this subject. Accordingly, on the authority of *Meat Cutters,* we hold that the Economic Stabilization Act of 1970, as it existed on August 15, 1971, was not an unconstitutional delegation of legislative power to the President.

3. *Did Executive Order 11615 violate § 202(b) of the Economic Stabilization Act?*

As originally enacted on August 15, 1970, the Economic Stabilization Act did not restrict the President's

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[11]See, *e.g., California Teachers Association v. Newport Mesa Unified School District,* C.D. Calif., 333 F. Supp. 436, 446-447 (1971); *United States v. Cincinnati Transit, Inc.,* S.D. Ohio, 337 F. Supp. 1068, 1072 (1972).

authority to institute selective economic controls. Accordingly, on March 29, 1971, the President issued Executive Order 11588, 36 Fed. Reg. 6339, which provided for the stabilization of wages and prices in a single industry (the construction industry) Less than two months later, Congress amended § 202 of the 1970 Act to add the following provision:

> "(b) The authority conferred on the President by this section shall not be exercised with respect to a particular industry or segment of the economy unless the President determines, after taking into account the seasonal nature of employment, the rate of employment or underemployment, and other mitigating factors, that prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages, have increased in the economy generally." Pub. L. 92-15, 85 Stat. 38 (May 18, 1971).

This provision remained in effect until the enactment of the 1971 Amendments on December 22, 1971. No comparable provision was retained in the amended Act.

The Falcons argue that Executive Order 11615 violated § 202(b) because (1) the Order affected "a particular industry or segment of the economy" only, and (2) no prior determination was made by the President that prices or wages in the affected segment increased at a rate which was grossly disproportionate to the rate at which prices or wages increased in the economy generally. The parties stipulated that the following segments of the economy were not subject to regulation under the Order: (1) raw agricultural products, (2) exports, (3) interest rates, (4) corporate stocks and bonds and municipal bonds, and (5) corporate dividends. On brief, the Falcons assert that the excluded segments represent business receipts during 1971 of 555 billion dollars, or approximately 20 percent of total business receipts in the United States. The parties have further stipulated that at the time of the issuance of Execu-

tive Order 11615, the President did not determine that prices and wages affected by the Order had increased at a grossly disproportionate rate when compared with the economy generally.

We initially note that of the five listed exempt categories, only raw agricultural products were expressly excluded by the Order. Prices of exports and stocks and bonds were first exempted by OEP Regulation No. 1, pursuant to the agency's authority under § 4(a) of the Order to grant exemptions. 36 Fed. Reg. 16515. Interest rates and corporate dividends were not subject to the freeze because they were not "prices, rents, wages, or salaries" within the meaning of the Act and the Order. See OEP Circular Nos. 1 and 3, 36 Fed. Reg. 16587 and 17345 (1971); and see Conf. Rep. No. 91-1386, 91st Cong., 2d Sess., p. 7 (1970).[12] Since § 202(b) refers only to the rate at which "prices or wages" have increased in the economy generally, the relevance of economic data pertaing to dividends and interest is questionable.

In any event, in light of both the language of § 202(b) and the legislative purpose behind its enactment, the Falcons' contention is without merit. Even if 80 per cent of the economy may be literally regarded as a "segment" of the entire economy, it surely is not a "particular * * * segment" within the meaning of § 202(b). It would be anomalous to require a finding that wages and prices comprising 80 per cent of the economy had increased at a rate "grossly disproportionate" to such increases in the "economy generally." Finally, the Report of the Senate Committee on Banking, Housing and Urban Affairs relative to § 202(b) confirms that the finding requirement was directed only at the imposition of controls over relatively small segments of the economy:

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[12]Interest and dividends subsequently were brought within the Act's coverage by §§ 202 and 203(a)(2) of the 1971 Amendments.

"The committee has serious reservations about applying the price and wage control authority *to a single industry*. An industry subject to price controls has no control over the price it must pay for the products of other industries. Likewise, workers subject to wage controls have no protection against a continued rise in the cost of living. * * *

"As a restriction on using the wage-price control authority *on a single industry*, the committee approved an amendment requiring a specific finding by the President. Under the amendment, the President is prohibited from using the authority *in a single industry* unless he determines that wages or prices in that industry have increased at a rate which is grossly disproportionate to the rate for the economy as a whole, after taking into account any mitigating factors such as the seasonal nature of employment or the rate of unemployment or under employment in the particular industry." S. Rep. No. 92-89, 92d Cong., 1st Sess., 1 U.S. Code Cong. & Admin. News 1971, pp. 1048-1049 (emphasis added).

Since § 202(b) does not apply to the controls instituted by Executive Order 11615, the President's action need only fall within the general authority conferred by § 202(a), *supra*. Such section clearly authorized the imposition of controls over something less than the entire economy.

4. *Did Executive Order 11615 and the regulations thereunder violate the Administrative Procedure Act?*

The Falcons contend that Executive Order 11615, CLC Order No. 1, and OEP Regulation No. 1 were issued without observance of procedures required by § 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553. In pertinent part, § 553 provides as follows:

"(b) General notice of proposed rule making shall be published in the Federal Register * * * . Except

when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making * * * .

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, * * * ."

No general notice of proposed rule making preceded the issuance of any of the orders or regulations here challenged. Further, neither Executive Order 11615 nor CLC Order No. 1 contained an express finding, accompanied by reasons, that "notice and public procedure * * * are impracticable, unnecessary, or contrary to the public interest." OEP Regulation No. 1 did contain such a finding, but only by virtue of an amendment to the Regulation dated November 12, 1971, *i.e.*, one day before Phase I was to expire.

Since each of the three challenged actions raise somewhat different problems, we shall treat them separately.

a. *Executive Order 11615*

The first question raised by the Executive Order is whether the President is an "agency" within the meaning of the APA. The case for subjecting the President of the

provisions of the APA is a strong one.[13] Courts have shown some reluctance to decide the question, however, in view of potential ramifications under the Freedom of Information Act,[14] see *Soucie v. David*, D.C. Cir., 448 F. 2d 1067, 1073 (1971), and the judicial review provisions of the APA,[15] see *Senate Select Committee on Presidential Campaign Activities v. Nixon*, D.D.C., 366 F. Supp. 51, 58 (1973). Upon this certification the Government had not made known its position with regard to this important question. We shall therefore assume, *arguendo*, that the President is an agency within the meaning of the APA.

The issue thus becomes whether we must set aside the Order for failure to conform with the procedural requirements of 5 U.S.C. § 553. In *Meat Cutters, supra*, these requirements were recognized but were deemed to be of little practical consequence in view of the exception provided by § 553(b)(B), *supra*. 337 F. Supp. at 761. The problem here cannot be so easily dismissed since the

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[13] 5 U.S.C. § 551 defines "agency," for purposes of §§ 551-559, to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include–(A) the Congress; (B) the courts of the United States; • • •." "The President" is not in terms excluded. In view of the glaring exclusion of two of the three principal branches of the Government, an intention not to exempt the President may be readily inferred. *Cf.* the Federal Register Act, 44 U.S.C. § 1501 *et seq.*, in which "agency" is defined by listing included offices, and where "the President" is included and "the legislative or judicial branches of the Government" are excluded. In *Meat Cutters, supra*, Judge Leventhal without deciding the question cited three leading scholars for the proposition that "the term 'agency' in the APA includes the President." 337 F. Supp. at 761.

[14] 5 U.S.C. § 552.

[15] 5 U.S.C. §§ 701-706. As is here relevant, the definition of "agency" contained in § 701 is identical to that in § 551.

Government has stipulated that the finding required to invoke the inception was not made.

At the outset, we are satisfied that there was in fact "good cause" to find that advance notice of the freeze was "impracticable, unnecessary, or contrary to the public interest" within the meaning of § 553(b) (B). This conclusion is based upon facts so obvious that they may be judicially noticed. Had advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct "actual transactions"— or avoid them—before the freeze deadline. Each price increase would have generated further increases in a growing spiral of inflation. We note in this connection the remarks of George P. Schultz, Director of the Office of Management and Budget, made during the course of an August 15, 1971 press conference, immediately prior to the President's announcement of the freeze:

> "• • • It is very difficult for the people in the administration to talk publicly about something like a wage-price freeze or something of that kind because immediately people raise their prices. In fact, I would say—and I don't have any really strong evidence to this effect—but I would say that the very large increase in the industrial component of the wholesale price index in July that was reported a week or so ago probably reflects a reaction to all of the talk, with people putting their list prices up. • • • "[16]

While the legislative history of the 1970 Act does not reveal consideration of the problem discussed by Director Schultz,[17] it is clear that Congress anticipated the need for abrupt action in dealing with inflation. The Report of

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[16]CCH Economic Controls ¶ 8367, p 8406 (1972).

[17]The House Committee on Banking and Currency subsequently did acknowledge this reason for secrecy in connection with Phase I, however. See H.R. Rep. No. 92-714, 92d Cong., 1st Sess., p. 4 (1971).

the House Committee on Banking and Currency repeatedly refers to the President's power under the Act as "standby authority." H.R. Rep. No. 91-1330, 91st Cong., 2d Sess., pp. 9, 11, 20 (1970). It would appear that a major factor in the decision of Congress to delegate such authority was its belief that only the Executive could properly react to day-to-day changes in the economy.[18] The psychological value of a "dramatic" initiation of controls appears also to have been contemplated. *Meat Cutters, supra,* p. 752. And although not phrased in terms of a finding for purposes of § 553(b)(B), *supra,* the preamble to the Order itself refers to another ground for urgency: "Whereas, the present balance of payments situation makes it especially urgent to stabilize prices, rents, wages, and salaries • • •."

The Falcons argue that because (1) the Government has stipulated that no finding was made, and (2) no finding and statement of reasons was incorporated in the Executive Order, the Order should now be set aside. We cannot agree that Congress intended to visit such consequences upon a technical violation of § 553(b) where the reasons for exempting the President's action from the notice requirement are so obvious and compelling. *Cf. Appalachian Power Co. v. Environmental Protection Agency,* 4 Cir., 447 F.2d 495, 502-503 (1973); *Duquesne*

[18]In response to criticism that the freeze should be instituted by Congress directly, and not by the President, the Committee Report states: "[A wage-price freeze] is not a legislative function, both in terms of appropriate timing in instituting the controls and removing them, since only the Executive can determine the appropriate time for instituting the controls and removing them • • •." Further: "if the Congress had mandated such action through to the termination date [of the Act], it would well be days or weeks before such action would be rescinded by the Congress if needed • • •." H. R. Rep. No. 91-1330, *supra,* p. 11.

Light Co. v. Environmental Protection Agency, 3 Cir., 481 F.2d 1, 8 (1973). A failure to incorporate in rules a statement of basis and purpose, in technical violation of § 553(c), has been held not to void the rules where "[b]oth the basis and purpose are obvious from the specific governing legislation and the entire trade was fairly apprised of them by the procedure followed." *Hoving Corp. v. Federal Trade Commission*, 2 Cir., 290 F.2d 803, 807 (1961). In both cases upon which the Falcons principally rely,[19] the inquiry was quite properly directed at whether the agency in fact had good cause to bypass the notice requirement. We hold that Executive Order 11615 did not violate § 4 of the Administrative Procedure Act.

b. *CLC Order No. 1*

On August 17, 1971, the CLC issued its Order No. 1 under the title, "Delegation of Authority." 36 Fed. Reg. 16215. The Order consisted of five brief paragraphs. The first and second paragraphs delegated the CLC's authority under §§ 1, 4(a), 5 and 7 of Executive Order 11615 to the Director of the OEP. Paragraph 3 of Order No. 1 directed executive departments and agencies to assist the Director pursuant to 31 U.S.C. § 691; paragraph 4 required consultation with the CLC on significant policy decisions; and paragraph 5 permitted the Director to redelegate the authority thereby conferred.

Section 553(b)(A) excepts, *inter alia*, "rules of agency organization, procedure, or practice" from the notice requirement of § 553. Nothing contained in CLC Order No. 1 goes beyond the matters thus excluded. Accordingly, Order No. 1 did not violate the APA.

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[19] *Texaco, Inc. v. Federal Power Commission*, 3 Cir., 412 F.2d 740 (1969); *Kelly v. Dept. of Interior*, E.D. Calif., 339 F. Supp. 1095 (1972).

c. *OEP Regulation No. 1*

The bulk of OEP Regulation No. 1 merely rephrases and interprets the Executive Order. Indeed, section 1 of the Regulation states that the Regulation's purpose is to "promulgate initial guidance and procedures" for implementing the freeze. To the extent that the Regulation is thus an "interpretative rule," it falls within the exception to § 553 provided by § 553(b)(A). To the extent that it arguably may prescribe non-exempt rules (none of which would appear to affect the Falcons in this case), the considerations previously set forth with respect to the Executive Order apply with equal force to the Regulation. We thus need not decide whether the amendment to the Regulation dated November 12, 1971, which was nothing more than a *pro forma* statement of the obvious,[20] could retroactively cure a technical flaw in the rule.

5. *Additional constitutional questions: Does Executive Order 11615 as applied represent an ex post facto law or bill of attainder, a taking of property without just compensation, or a denial of due process of law?*

The Falcons finally advance a variety of constitutional arguments relating to the allegedly retroactive nature of the Executive Order as here applied. Similar arguments on previous occasions have been uniformly rejected by our court. See *USC, supra*, p. 1070; *IBEW Local 11 v. Boldt, supra*, p. 1395 (just compensation); *Western States Meat Packers Association, Inc. v. Dunlop*, T.E.C.A., 482 F.2d 1401, 1403-1404 (1973) (just compensation); see also *Meat Cutters, supra*, pp. 763-764 (due process); *Taylor v. Brown*, Emer. Ct. App., 137 F.2d 654, 659-660, *cert.*

[20] "Because of the need for prompt determinations, notice of proposed rule making and public procedure thereon have been found to be impracticable and contrary to the public interest." 36 Fed. Reg. 21761 (1971).

denied, 320 U.S. 787 (1943) (*ex post facto*, just compensation).

The Falcons argue from the assumption that their rights in the season ticket sale proceeds were "vested" and "unqualified" as of August 15, 1971. Such assumption is faulty inasmuch as the Falcons concede, elsewhere in their brief, that if the games had not been performed they would have been liable for the purchase price. See, *e.g.*, *De La Ysla v. Publix Theatres, Corp.*, 26 P.2d 818 (Utah 1933). The authorities cited by the Falcons do not so much indicate that a ticket is not a contract, as hold that the seller's duty and the remedies for breach thereof are limited. A ticket does not create an irrevocable right of entry, *Marrone v. Washington Jockey Club*, 227 U.S. 633 (1913), nor does it warrant against personal injuries, *Jordan v. Concho Theatres, Inc.*, 160 S.W.2d 275 (Tex. Civ. App. 1941). We are cited to no case, however, which indicates that the Falcons could refuse to perform the scheduled games with impunity on the ground that their prior rights were "unqualified."[21]

It is well settled that Congress may interfere with private contractual obligations where such interference is a necessary incident of otherwise valid legislation. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-311 (1935); *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 480-483 (1911); *USC, supra*, p. 1070. That one of the contracting parties may have completely performed his obligations does not remove this "congenital infirmity" (*Norman, supra*, p. 308) which is a part of every contract subject to Congressional power. *Louisville & Nashville R. Co. v. Mottley, supra.*

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[21]Contrast *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), holding that a statute which deprived mortgagees of substantial existing rights in specific mortgaged property violated the Fifth Amendment.

As for the *ex post facto* clause, the Order cannot be said to *punish* the Falcons for prior conduct within the meaning of such cases as *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1809), and *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867). See also, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798). Neither is the Order a bill of attainder, see *United States v. Brown*, 381 U.S. 437, 447 (1965). It is true that § 204 of the 1970 Act prescribes fines for willful violations. However, the Government has sought only an injunction and restitution under § 205, for which there is no requirement of willfulness, and none of the letters or telegrams referred to in the Falcons' complaint threaten criminal action or accuse the Falcons of willful wrongdoing. In *Manning v. University of Notre Dame Du Lac*, T.E.C.A. 484 F.2d 501, 503-504 (1973), on nearly identical facts, we indicated that the violation likely was not willful within the meaning of § 208(a) of the amended Act (the successor to § 204). In any event, any fine which might be imposed would be based upon willful conduct which occurred after the effective date of the Order.

II

No. 5-6 arises out of plaintiff Burt DeRieux's purchase of four Atlanta Falcons season tickets in June 1971. On August 27, 1971, DeRieux by letter demanded the return of $1.50 per ticket per game; the demand was rejected by the Falcons on September 2. Thereafter, on September 10, DeRieux filed the present class action on behalf of all Falcons season ticket holders. DeRieux's action preceded by seventeen days the Government's suit for injunction and restitution (No. 5-8).[22]

[22]DeRieux alleges that the government instituted its enforcement action only as a result of his persistent protests, which included the August 27 letter to the Falcons, a complaint with the Internal Revenue Service dated September 9 and, shortly thereafter, the present lawsuit.

Both the original and first amended complaints alleged that the action arose under the Economic Stabilization Act of 1970, and invoked federal jurisdiction under 28 U.S.C. § 1331.[23] The complaints recognized, however, that the plaintiff sought relief "not provided for in the Economic Stabilization Act, Executive Order 11615, or in any other administrative forum, and which only this Court can grant." By amendment to the complaint, filed July 23, 1973, DeRieux alleged for the first time that his claim was based upon § 210 of the amended Act. [24]

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[23]Apparently recognizing the jurisdictional problem posed by *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), DeRieux now additionally claims that jurisdiction is conferred by 28 U.S.C. § 1337, under which there is no requirement of a $10,000 minimum amount in controversy.

[24]"§ 210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of proceedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, That where the overcharge is not willful within the

The amendment further alleged that the Falcons "have and continue to willfully refuse to refund the amount due * * * despite the decision of the Temporary Emergency Court of Appeals in [*USC*]." Finally, the amendment sought treble damages in the amount of $1,140,000.00, attorneys fees and costs pursuant to § 210(b) of the amended Act.

The principal question now presented is whether either the 1970 Act or § 210 of the amended Act create a private right of action for Phase I violations which occurred prior to December 22, 1971, the date on which § 210 was enacted.

In terms, the 1970 Act, in § 205, provided only for injunctive relief in actions brought by an agency of the United States:

> "Whenever it appears to any agency of the United States, authorized by the President to exercise the authority contained in this section * * * that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order under this title, it may in its discretion bring an action * * * to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the agency, any such court may also issue mandatory injunctions commanding any person to comply with any regulation or order under this title."

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meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title."

Section 7(b) of the Executive Order conferred upon the CLC the authority "in its discretion" to request the Department of Justice to bring actions for injunctions under § 205.

Faced with the absence of any express authority for a private right of action under the 1970 Act, DeRieux argues that such a right may be implied from the purposes and policies of the Act. See *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). More specifically, the argument is that "the class's claim is within the scope of the very rights which the statute and the Executive Order were attempting to protect." The purpose of the Act, DeRieux argues, was "to protect consumers from an increase in prices."

The question of implied private rights of action was most recently the subject of Supreme Court review in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, ... U.S. ..... (No. 72-1289, Jan. 9, 1974). There, the Court undertook to construe § 307(a) of the "Amtrak Act," 45 U.S.C. § 547(a). Section 307(a) authorized enforcement actions by the Attorney General and, in cases involving a labor agreement, by affected employees or their representatives. After examining legislative history and the policies of the Act, the Court concluded that § 307(a) provided the exclusive remedies for violations and that no additional private right of action could properly be inferred.

In some respects, the problem in *Railroad Passengers* was different than that posed by § 205 of the Economic Stabilization Act. Since the Amtrak Act expressly authorized some private actions (by employees under a labor agreement), the maxim *expressio unius est exclusio alterius* applied with particular force to other private actions not so authorized. In addition, in drafting the final Amtrak bill Congress had considered and rejected a proposal to permit suits by any "aggrieved person." Our review of the

legislative history of the Economic Stabilization Act of 1970 has failed to reveal any specific consideration of proposals to create or limit private rights of action.[25]

We are not left totally without guidance, however. In interpreting the 1970 Act, the provisions of prior economic controls legislation are significant. *Meat Cutters, supra,* p. 748. Both the Emergency Price Control Act of 1942 and the Defense Production Act of 1950 provided for private damage actions in addition to Government suits for injunctions and fines. 56 Stat. 23, 34; 64 Stat. 798, 811. The similarity in language between § 205 and the injunction provisions of the two earlier statutes indicates that § 205 was derived from those provisions; this is confirmed by the legislative history.[26] From this background of prior law, Congress surely was aware of the possibility of private enforcement, and its failure to expressly provide for private actions in the 1970 Act can only be regarded as intentional.

Further, an examination of the purpose of the 1970 Act supports the conclusion that the remedies contained in § 205 were intended to be exclusive. Congress anticipated that the President would implement the Act by imposing a short term freeze of only two or three months' duration. H.R. Rep. No. 91-1330, *supra,* p. 9. The purpose of the anticipated freeze was to break the nation's "inflationary psychology" and to provide a breathing period during which longer term controls could be formulated. See *Meat Cutters, supra,* pp. 747-748, 751-752; Hearings

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[25]The adequacy of the Act's enforcement provisions were challenged, however, both in hearings and on the floor of the House. See Hearings on H.R. 17880 before the House Committee on Banking and Currency, 91st Cong., 2d Sess., pp. 83-84; 116 Cong. Rec. 26837 (1970) (remarks of Representative Anderson).

[26]Remarks of Representative Reuss, Hearings on H.R. 17880, *supra* n. 25, pp. 5-6 (1970): "The language of title II is derived from the battle-tested language of the Emergency Price Control Act of 1942."

on H.R. 17880, *supra* n. 25, pp. 6, 11-12. It is entirely reasonable that Congress would choose not to confer individual rights of action with respect to controls of such short duration and uncertain consequence.

The difference between the Economic Stabilization Act of 1970 and statutes under which an implied private right of action has been recognized is apparent. Unlike the Voting Rights Act of 1965,[27] the Securities Exchange Act of 1934,[28] or the Federal Safety Appliance Acts,[29] the Economic Stabilization Act was not designed to protect or confer "private rights" within the usual meaning of that phrase. Indeed, as the present case well illustrates, the effect of the Act and Order in many instances was destructive of private contract rights. Rather, the Act prescribed emergency medicine to remedy an affliction affecting the entire national economy. Individuals were ultimately sought to be benefitted, but as a consequence of overall economic stabilization. There was no intention to benefit a specific class. *Cf. Daly v. Columbia Broadcasting System, Inc.*, 7 Cir., 309 F.2d 83 (1962). Even when Congress amended the Act to provide for individual actions, in § 210, its principal concern was deterrance and effective enforcement and not the vindication of individual "rights" as such. See H.R. Rep. No. 92-714, 92d Cong., 1st Sess., pp. 8, 28 (1971). We conclude that a private right of action cannot be inferred from the 1970 Act.[30]

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[27]See *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

[28]See *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

[29]See *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 (1916).

[30]Accord, *ICA Southeast, Inc. v. Optimum Systems, Inc.*, E.D. La., CCH Economic Controls ¶ 9999A(1), p. 9991 (1971). *Cf. Heavy Contractors Association, Inc. v. Operating Engineers Local 571*, D. Neb., 328 F. Supp. 897 (1971); and see *Acorn Iron & Supply Co. v. Bethlehem Steel Co.*, E.D. Pa., 96 F. Supp. 481 (1951).

DeRieux next argues that even if no implied right of action was created by the 1970 Act, the December 22, 1971 amendments to the Act supplied the previously missing remedy. The question is whether § 210 of the amended Act, *supra* n. 24, may be read to have retrospective effect.

If § 210 were solely concerned with perfecting a remedy for previous violations of the law, it might well permit the construction here urged. See *Bradley v. Richmond School Board*, ____ U.S. ____ (No. 72-1322, May 15, 1974); *Koger v. Ball*, 4 Cir. ____ F.2d ____ (No. 73-2332, May 10, 1974). But the 1971 Amendments did more than merely make recovery more convenient or more certain. Section 210(b) provides for the awarding of a sum equal to the greater of (1) three times the amount of the overcharge, or (2) not less than $100 nor more than $1,000. Thus, the damages available under § 210(b) are punitive in nature and substantially larger than those previously recoverable in Goverment actions for restitution. The amendment to the complaint here invokes these very provisions in seeking treble damages in excess of $1,100,000.

For this reason, we believe that § 210 represents an exception to the general rule regarding retrospective application in pending cases of changes in the law. That rule, as recently articulated by the Supreme Court in *Bradley v. Richmond School Board, supra,* is that "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." Slip op. at 17-18. The *Bradley* Court was nevertheless careful to state that courts need not always apply intervening law in the absence of clear legislative direction to the contrary. Rather, exceptions should be drawn where application of the intervening statute would result in manifest injustice. The Court further indicated that the question of retrospective application was to be determined in each case by analysis of

"(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 20.

Here, the decisive factor is the impact of § 210 upon the Falcons' rights. Unlike the *Bradley* situation, where the intervening statute merely provided for an award of attorneys fees to which plaintiffs arguably already were entitled, the application of § 210 would impose "an additional [and] unforeseeable obligation" in the form of potential treble damages. *Id.* at 24. Even though such an award is discretionary with the district court, its prospect alone might have caused the Falcons to order their conduct differently so as to avoid the risk. *Id.* at 23. In light of the new obligation imposed, § 210 should not be construed to act retrospectively.[31]

This conclusion is fortified by the deterrent purpose of § 210, above referred to. Only future conduct can be deterred. Further, where Congress desired that the 1971 Amendments apply to pending cases (or, by analogy, to previous violations), it did not lack for words to make such purpose clear. Compare § 210(a), *supra* n. 24, with § 211(a) and (h).[32] We do not read *Bradley* to hold that

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[31]Accord, *Piaskoski v. Associated Hospital Service, Inc.*, E.D. Wis., 347 F. Supp. 470 (1972). See also, *United States v. St. Regis Paper Co.*, S.D. N.Y., 106 F. Supp. 286, 291 (1952) (amended regulation under Defense Production Act).

[32]§ 211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder • • •.

• • •

(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title."

evidence of legislative intent short of express statutory language is irrelevant to the retroactivity question, and we believe these factors are significant.

DeRieux finally argues that § 210 applies prospectively to the Falcons' continuing refusal to refund the overcharges. Such contention was squarely rejected in *Manning v. University of Notre Dame Du Lac, supra*, where we held that the "overcharge" occurred, at the latest, at the time the football games were played. The argument that the "legal wrong" language of § 210(a) provides a separate basis for relief was also there rejected. 484 F.2d at 504.

It is true that *Manning* applied the provisions of § 210 in a class action based upon a Phase I violation. *Manning* did not recognize or treat the threshold retroactivity issue, however, and is therefore in no way contrary to our disposition of this case. See *Webster v. Fall*, 266 U.S. 507, 511 (1925).

DISPOSITION

Pursuant to the authority granted by § 211(c) and (h) of the Economic Stabilization Act of 1970, as amended, this court now makes the following disposition of these consolidated cases:

The complaint in No. 5-6 fails to state a claim upon which relief may be granted. Accordingly, No. 5-6 is remanded to the district court with directions to dismiss the complaint.

In No. 5-7, defendants are entitled to judgment as a matter of law. No. 5-7 is therefore remanded to the district court with directions to enter judgment in accordance with this opinion in favor of defendants.

In No. 5-8, the United States is entitled to judgment as a matter of law. Accordingly, No. 5-8 is remanded to the district court with directions to enter judgment in accordance with this opinion in favor of plaintiff. The district court is further directed to determine and carry out such remedies as it may deem appropriate, including the amount and manner in which restitution should be made. See *University of Southern California v. Cost of Living Council, supra,* 472 F.2d at 1070; *Murphy v. O'Brien, supra,* 485 F.2d at 676, compare *Manning v. University of Notre Dame Du Lac, supra.*

Remanded with directions.

Appendix D

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

No. C-71-2214 RFP

Oakland Raiders, etc.,
Plaintiff,

vs.

Office of Emergency Preparedness, et al.,
Defendants.

[Filed Jan. 25, 1974]

MEMORANDUM AND ORDER

Plaintiffs Oakland Raiders (Raiders) brought this action seeking a declaratory judgment that their increase in ticket prices for the 1971 football season did not violate the so-called "wage-price freeze" imposed by the President on August 15, 1971. The action came on for hearing before the court on September 17, 1973, on a motion for summary judgment by the defendants, namely, the Office of Emergency Preparedness (OEP), Cost of Living Council (COLC), and Ralph D. Burns.

In early 1971, the Raiders sent out renewal applications to all their season ticketholders from the previous year; all ticket prices had been increased over the 1970 prices. By late June, over 48,000 season tickets (out of a total stadium capacity of 54,000) had been purchased and paid in full. These tickets were mailed to the purchasers in late July.

On August 9 and 14, 1971, the Raiders played their first two exhibition games of the 1971 season at home. On August 15, the President issued Executive Order 11615 (36 Fed. Reg. 15727), proclaiming the "wage-price freeze";

the legal basis for the freeze was found in the Economic Stabilization Act of 1970, P.L. 91-379, 84 Stat. 799. The Raiders subsequently played two more exhibition games at home, then in October played three regular season home football games at ticket prices that were $.50 over those charged for the exhibition games. Thereafter, during Phase II, the Raiders played four additional home games.

Under the provisions of Executive Order 11615, prices were to be stabilized at a level not exceeding the highest prices pertaining to a substantial volume of actual transactions during the 30-day "base period" ending August 14, 1971.

Defendants appear to concede, as indeed they must, that the playing of two exhibition games during the "base period" prior to August 15 was sufficient to legitimize the increase over 1970 prices; and defendants further appear to concede that the further increase in ticket prices for regular season games over the price charged for exhibition games was legitimate under the Phase II guidelines as to all games after November 13, 1971. Thus the primary point of contention seems to be the validity of the $.50 price increase for the three regular season home games played during October 1971.

Regulations issued by the OEP in Economic Stabilization Circular No. 11, 36 Fed. Reg. 18315 (September 11, 1971), provide that "the freeze applies to prices of advance sale tickets for sporting events occurring during the freeze." If these regulations are correct in their interpretation of the effects of the freeze, then ticket prices for all sporting events occurring during Phase I of the freeze would be restricted to the highest level set by a substantial volume of transactions during the base period prior to August 14; and since the term "transaction" is thereby deemed to embrace the actual performance of the event rather than the mere sale of tickets, the effect would be to freeze ticket prices at the level of the tickets sold for events

actually occurring during the base period, namely, the two exhibition games.

The Raiders have argued against this interpretation of the freeze provisions on several grounds, including: (1) that the OEP has misinterpreted the phrase "actual transactions," which should be read to include only the ticket sale itself and not the performance of the actual sporting event; (2) that the OEP is arbitrary in its treatment of sporting events, since it has refused to roll back tuition increases by educational institutions in situations where payment was made before the freeze for delivery of services during the freeze period; and (3) that the entire framework of delegated authority established by the Economic Stabilization Act and Executive Order 11615 is unconstitutionally broad.

As the Raiders recognize, all three of these arguments have already been carefully considered and rejected by other courts. In *University of Southern California (USC) v. Cost of Living Council*, 472 F.2d 1065 (Temp. Emer. Ct. App. 1972), *cert. denied* .....U.S..... (Feb. 20, 1973), the Temporary Emergency Court of Appeals upheld the OEP's interpretation of "actual transaction" as applied to advance sales of tickets for sporting events and rejected the suggested analogy to tuition increases on the basis of the "particularly singular nature of education as a whole." 472 F.2d at 1071-72. The court also rejected attacks on the constitutionality of the wage-price controls with an approving citation to *Amalgamated Meat Cutters v. Connally*, 337 F.Supp. 737 (D.D.C. 1971), in which a three-judge court carefully examined all aspects of the delegation of authority under the Economic Stabilizaton Act and upheld the Act's constitutionality. After disposing of these contentions, the court held that advance sale tickets for football games were in fact subject to the freeze and remanded the case to the District Court with indications that the refund sought by the OEP should be granted.

The Raiders seek to distinguish their own situation from the facts in *USC v. Cost of Living Council, supra,* on the grounds that the Raiders' tickets were sold as part of a season ticket package rather than as individual game tickets; thus, they argue, it is improper to assign a higher price to the regular season tickets in the season ticket package than the price assigned to the exhibition game tickets in the same package. If this reasoning is followed and the price of the season ticket package is pro-rated evenly over all the home games for the 1971 season, regardless of whether they were exhibition games or regular season games, then it is evident that there was no price *increase* from the exhibition tickets to the regular season tickets. However, as defendants have pointed out, each ticket in the season ticket package has a price printed on it equal to the price which would have been charged for that ticket if purchased individually at the gate prior to the game; moreover, the stipulation of facts entered into by counsel for the Raiders concedes that the total price of the season ticket package equals the sum of the prices of each individual ticket in the package.

It is therefore clear, and this court so finds, that Raider ticket purchasers paid $.50 per ticket more for regular season games than for exhibition games. For the reasons stated above, this increased ticket price for the three home games played in October 1971 violated the terms of the wage-price freeze.

The remedy sought by OEP on its counterclaim takes the form of a refund to identifiable ticket purchasers and a reduction in ticket prices for the next season until the remainder of the illegal overcharges has been dissipated. Under the initial version of the Economic Stabilization Act of 1970, the sole remedies available to the government were a $5,000.00 fine and injunctive relief, including mandatory injunctions. P.L. 91-379, §§ 204, 205. It was not until the amendments of December 22, 1971, that express

authority was given to the courts to order restitution of overcharges as part of the relief available. P.L. 92-210, § 209. Nevertheless, in the USC case, *supra*, the Temporary Emergency Court of Appeals held that even under the Act as it existed prior to the amendments, "the power to issue mandatory injunctions includes the power to order restitution or refund of funds held in violation of the regulations and rulings of the CLC and OEP." 472 F.2d at 1070. Thus there can be no question of this court's power to grant the relief sought by the OEP herein.

On the basis of the entire record, including the arguments submitted on behalf of all parties, this court finds that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That the defendants' motion be granted, and that this summary judgment in their favor and against the plaintiff be entered accordingly; and

2. That as part hereof, the plaintiff shall forthwith make restitution by refunding all unlawful overcharges (as identified above) to the affected ticket purchasers; and, where such ticket purchasers are not identifiable, plaintiff shall disgorge its unlawful gains by reducing ticket prices for box office sales at home games during the next regular season by the amount of the illegal increase, i.e., $.50, until the total amount of reimbursements due unidentifiable ticket purchasers is exhausted.

Dated: Done Dec. 28, 1973

Signed January 2, 1974

/s/ Robert H. Peckham
United States District Judge

Appendix E

Temporary Emergency Court of Appeals of the United States

Oakland Raiders, Plaintiff-Appellant, vs. Office of Emergency Preparedness, Cost of Living Council, and Ralph D. Burns, Defendants-Appellees.	No. 9-11

[Filed July 10, 1974]

Appeal from the United States District Court
Northern District of California

ORDER

Herman Cook and Ralph A. Lombardi, Attorneys, (Hardin, Cook, Loper, Engel & Bergez) Oakland, California for the Appellants.

Paul T. Michael, Attorney (Department of Justice, Carla A. Hills, Assistant Attorney General and Stanley D. Rose on the briefs) Washington, D. C., for the Appellees.

Before: CARTER, CHRISTENSEN and ESTES, Judges.

The judgment is affirmed on the authority of *DeRieux v. The Five Smiths, Inc.*, (T.E.C.A., June 20, 1974, No. 5-6, No. 5-7 and No. 5-8) ..... F.2d .....

Appendix F

ADMINISTRATIVE PROCEDURE ACT

§551. Definitions

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641 (b) (2), of title 50; appendix;

• • • • •

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of val-

uations, costs, or accounting, or practices bearing on any of the foregoing;

* * * * *

§553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Appendix G

THE PRESIDENT
EXECUTIVE ORDER 11615

Providing for Stabilization of Prices, Rents, Wages, and Salaries

WHEREAS, in order to stabilize the economy, reduce inflation, and minimize unemployment, it is necessary to stabilize prices, rents, wages, and salaries; and

WHEREAS, the present balance of payments situation makes it especially urgent to stabilize prices, rents, wages, and salaries in order to improve our competitive position in world trade and to protect the purchasing power of the dollar:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Economic Stabilizatoin Act of 1970 (P. L. 91-379, 84 Stat. 799), as amended, it is hereby ordered as follows:

SECTION 1. (a) Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to

pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.

(b) Each person engaged in the business of selling or providing commodities or services shall maintain available for public inspection a record of the highest prices or rents charged for such or similar commodities or services during the 30-day period ending August 14, 1971.

(c) The provisions of section 1 and 2 hereof shall not apply to the prices charged for raw agricultural products.

SECTION 2. (a) There is hereby established the Cost of Living Council which shall act as an agency of the United States and which is hereinafter referred to as the Council.

(b) The Council shall be composed of the following members: The Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the Director of the Office of Emergency Preparedness, and the Special Assistant to the President for Consumer Affairs. The Secretary of the Treasurer shall serve as Chairman of the Council and the Chairman of the Council of Economic Advisers shall serve as Vice Chairman. The Chairman of the Board of Governors of the Federal Reserve System shall serve as adviser to the Council.

(c) Under the direction of the Chairman of the Council a Special Assistant to the President shall serve as Executive Director of the Council, and the Executive Director is authorized to appoint such personnel as may be necessary to assist the Council in the performance of its functions.

SECTION 3. (a) Except as otherwise provided herein, there are hereby delegated to the Council all of the powers conferred on the President by the Economic Stabilization Act of 1970.

(b) The Council shall develop and recommend to the President additional policies, mechanisms, and procedures to maintain economic growth without inflationary increases in prices, rents, wages, and salaries after the expiration of the 90-day period specified in Section 1 of this Order.

(c) The Council shall consult with representatives of agriculture, industry, labor and the public concerning the development of policies, mechanisms and procedures to maintain economic growth without inflationary increases in prices, rents, wages, and salaries.

(d) In all of its actions the Council will be guided by the need to maintain consistency of price and wage policies with fiscal, monetary, international and other economic policies of the United States.

(e) The Council shall inform the public, agriculture, industry, and labor concerning the need for controlling inflation and shall encourage and promote voluntary action to that end.

SECTION 4. (a) The Council, in carrying out the provisions of this Order, may (i) prescribe definitions for any terms used herein, (ii) make exceptions or grant exemptions, (iii) issue regulations and orders, and (iv) take such other actions as it determines to be necessary and appropriate to carry out the purposes of this Order.

(b) The Council may redelegate to any agency, instrumentality or official of the United States any authority under this Order, and may, in administering this Order,

utilize the services of any other agencies, Federal or State, as may be available and appropriate.

(c) On request of the Chairman of the Council, each Executive department or agency is authorized and directed, consistent with law, to furnish the Council with available information which the Council may require in the performance of its functions.

(d) All Executive departments and agencies shall furnish such necessary assistance as may be authorized by section 214 of the Act of May 3, 1945 (59 Stat. 134; 31 U.S.C. 691).

SECTION 5. The Council may require the maintenance of appropriate records or other evidence which are necessary in carrying out the provisions of this Order, and may require any person to maintain and produce for examination such records or other evidence, in such form as it shall require, concerning prices, rents, wages, and salaries and all related matters. The Council may make such exemptions from any requirement otherwise imposed as are consistent with the purposes of this Order. Any type of record or evidence required under regulations issued under this Order shall be retained for such period as the Council may prescribe.

SECTION 6. The expenses of the Council shall be paid from such funds of the Treasury Department as may be available therefor.

SECTION 7.(a) Whoever willfully violates this Order or any order or regulation issued under authority of this Order shall be fined not more than $5,000 for each violation.

(b) The Council shall in its discretion request the Department of Justice to bring actions for injunctions

authorized under Section 205 of the Economic Stabilization Act of 1970 whenever it appears to the Council that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order issued pursuant to this Order.

THE WHITE HOUSE,

August 15, 1971.

/s/ RICHARD NIXON

[FR Doc. 71-12119 Filed 8-16-71; 12:25 pm]

Note: For the text of the President's radio and television address in connection with E.O. 11615, above, see Weekly Comp. of Pres. Docs., Vol. 7, No. 34, issue of Aug. 23, 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-421

CLEVELAND BROWNS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A1) is not yet reported. The Temporary Emergency Court of Appeals rendered no opinion (Pet. App. B).

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on September 13, 1974. The petition for a writ of certiorari was filed on October 15, 1974. The jurisdiction of this Court is invoked under Section 211'g) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 750, 12 U.S.C. (Supp. II, 1970 ed.) 1904.

QUESTIONS PRESENTED

1. Whether technical non-compliance with Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, by the President in issuing Executive Order 11615, which imposed a 90-day freeze on prices, rents, wages and salaries, invalidated the freeze.

2. Whether the administrative interpretations of the Office of Emergency Preparedness should be afforded great deference.

3. Whether the application of Executive Order 11615 to petitioner's advance sales of football game tickets constitutes an *ex post facto* law or is a taking of petitioner's property without just compensation.

4. Whether petitioner may be required, as a means of restitution, to reduce the prices for future ticket sales until the amount of money received as overcharges of unidentified ticket purchasers is exhausted.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, Section 9, clause 3 of the United States Constitution provides in pertinent part:

> No * * * ex post facto Law shall be passed.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553 (Pet. App. F 73-74) and Executive Order 11615 (Pet. App. G) are set forth in the Appendix to the petition for a writ of certiorari.

Circular No. 7 issued by the Office of Emergency Preparedness (36 Fed. Reg. 17578) provides in pertinent part:

> A transaction takes place when the seller ships the product to the buyer, not when the order is received. In the case of a service, the transaction takes place when the service is performed.

Circular No. 11 issued by the Office (36 Fed. Reg. 18315) provides in pertinent part:

> The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze.

STATEMENT

Petitioner owns and operates the Cleveland Browns professional football team (the "Browns"). In January 1971 the Browns announced an increase in home game ticket prices for the 1971 football season. By August 12, 1971, the Browns had sold 48,033 season tickets and 86,347 individual game tickets for the 1971 football season.

On August 15, 1971, the President issued Executive Order 11615, which imposed a 90-day freeze upon prices, rents, wages and salaries. Under Executive Order 11615, prices were to be stabilized

> at levels not greater than the highest of those pertaining to a substantial volume of actual transactions * * * of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services [Pet. App. G76].

The Browns played no home games in the 30-day period prior to August 15, 1974. Therefore, under the Executive Order the highest price which could have been charged was

> the highest price * * * in the nearest preceding 30-day period in which transactions did occur [Pet. App. G76].

The President delegated to the Cost of Living Council the authority to implement Executive Order 11615. The Council then delegated to the Office of Emergency Preparedness (the "Office") authority to implement and administer the Executive Order. 36 Fed. Reg. 16215.

On September 2, 1971, the Office issued Circular No. 7, which provided with respect to "transactions" as used in the Executive Order:

> A transaction takes place when the seller ships the product to the buyer, not when the order is received. In the case of a service, the transaction takes place when the service is performed.

The Office further determined, in Circular No. 11, that "[t]he freeze applies to prices of advance sale tickets for sporting events occurring during the freeze."

The United States commenced this action in the United States District Court for the Northern District of Ohio, seeking to enforce the Executive Order, as interpreted by the Office, against petitioner. The district court granted the government's motion for summary judgment and ordered petitioner to make restitution of the increase in the prices received for home games played during the 90-day freeze, by making refunds to identifiable purchasers and by reducing future ticket prices

until the total overcharges to unidentifiable purchasers are offset. The Temporary Emergency Court of Appeals affirmed (Pet. App. B).

ARGUMENT

1. The first three questions raised here are essentially the same as those raised in *University of Southern California* v. *Cost of Living Council*, 472 F. 2d 1065 (T.E.C.A.), certiorari denied, 410 U.S. 928, and *DeRieux* v. *The Five Smiths, Inc.*, 499 F. 2d 1321 (T.E. C.A.), certiorari denied *sub nom. The Five Smiths, Inc.* v. *Hollaway*, No. 73-2046, decided October 21, 1974.[1] With respect to those issues we rely upon our brief in opposition in *The Five Smiths*, a copy of which is being furnished to petitioner.

2. The district court did not abuse its discretion by ordering restitution of the monies received from unidentified ticket purchasers to be made by reducing future ticket prices. Section 209 of the Economic Stabilization Act, as amended, 85 Stat. 748, 12 U.S.C. (Supp. II, 1970 ed.) 1904, explicitly authorizes the district court to order restitution. The type of distribution ordered here is an accepted restitutionary remedy, cf. *Bebchick* v. *Public Utilities Commission*, 318 F. 2d 187 (C.A. D.C.); *Market Street Railway Co.* v. *Railroad Commission*, 28 Cal. 2d 363, and therefore is within the statutory provision for restitution.[2] A contrary conclusion would mean that the statute permits the Browns to retain the unlawful overcharges.

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[1]The same issues are also presented in *Oakland Raiders* v. *Office of Emergency Preparedness*, petition for a writ of certiorari pending, No. 74-85.

[2]The authority cited by the Browns, *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005 (C.A. 2), vacated on other grounds, No. 73-203, decided May 28, 1974, is inapposite because it concerned only the distribution of damages in a private antitrust class action under Fed. R. Civ. P. 23. See Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1974.

DOJ-1974-11